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DISCUSSION OF RECENT DECISIONS

ATTORNEY AND CLIENT—THE OFFICE OF ATTORNEY—WHETHER REQUIREMENT OF GRADUATION FROM AN ACCREDITED LAW SCHOOL WOULD BE A CONSTITUTIONAL CONDITION TO RIGHT TO PRACTICE LAW—The intrinsic nature of the privilege involved in an admission to a state bar has been re-emphasized in the recent New Mexico case of *Henington* v. *State Board of Bar Examiners*.[1] The plaintiff there had tendered his application for admission to the bar accompanied with the required examination fee but had not enclosed with his application any evidence showing his graduation

[1] 60 N. M. 393, 291 P. (2d) 1108 (1956).

from an accredited law school or a certificate from a New Mexico attorney showing the applicant to be a person of good moral character. For failure to comply with the state rule in this respect,[2] the state board rejected this application. The plaintiff then, through mandamus proceedings, sought to compel the defendant board and its members to examine the plaintiff as to his qualifications but, on hearing, the provisional writ of mandamus was quashed. When plaintiff appealed to the Supreme Court of New Mexico, asserting that the so-called "college graduation" rule violated his constitutional rights,[3] that court held the provisions of the rule relating to application for admission to the bar were valid and did not violate either the due process or the equal protection clauses, so it affirmed the trial court determination.

The power of the judicial department to generate conditions such as these probably goes back to England and the time of Edward I.[4] Since then, statutes have generally recognized that prime control over the admission of attorneys is a matter properly belonging to the courts, who have been vested with judicial discretion in this connection, so legislation has seldom been enacted to do more than protect the public against the admission of improper persons.[5] It is to be noted, however, that the earliest teachings of the common law, and the training of persons to serve at the bar, was not a task performed by the courts or agencies thereof but was done, in the main, in the monasteries, the universities, and the households of the nobility until the rise and development of the Inns of the legal profession.[6] Following the establishment of these Inns, at least with respect to admission to the ranks of the barrister group, the method followed in England has been so different from the one presently pursued in this country that the question presented in the principal case has not arisen in the past and will not be likely, in the immediate future, to pose a problem in that country.[7] In certain of the British dominions and

[2] Rule 1, § 2, of the New Mexico Supreme Court states: "No person, other than those admitted on certificate from other states, shall be granted a license to practice law in this state . . . unless such person shall have graduated from a law school approved by the American Bar Association as meeting the standards of that Association." The requirement for a certificate of good moral character is imposed by Rule 2, § 2.

[3] Plaintiff relied upon the Fourteenth Amendment to the United States Constitution and on N. M. Const. 1912, Art. 2, § 18.

[4] Pollack and Maitland, Hist. Eng. Law, Vol. 1, p. 194.

[5] One such instance may be found in 4 Hen. IV, c. 18 (1402).

[6] See Cullinan, "Requirements for Admission to Practice in England, Ireland, the Australian States, New Zealand, and the Canadian Provinces," 19 Bar Exam. 2 (1950), for a general discussion of the point.

[7] Halsbury's Laws of England, 3d Ed., Vol. 3, p. 6, and 2d Ed., Vol. 2, Part I, p. 479, contains a statement of the English system with respect to both the barrister and the solicitor groups.

provinces, however, the matter of legal education, as well as of admission to practice, is generally under the control of the organized bar, which usually works in close cooperation with a local university, and the requirements are much the same as those specified in the United States.[8] Since, in these areas, both the size of the bar and the number of law schools is small, the matter of graduation from an accredited school will probably cause no immediate problem.

It is in the United States, therefore, where a question of this nature is most likely to arise, particularly since the matter of providing an education in law has, for over fifty years, generally been left to the schools whose product has, because of the uneven quality of the instruction so provided, been subjected to examination prior to admission to the bar. The problem manifests itself in two respects: first, is the right to study law and to be admitted to the bar a right protected by constitutional fiat, so that any restraint thereon would amount to a deprivation of constitutional rights; and second, if not, upon whom does the prerogative of fixing conditions for admission to the bar rest?

As to the first of these points, it may be said that, except in a few former instances where state constitutions directed otherwise, the courts have continually held that the matter of admission to the ranks of attorneys is not a matter of right, hence cannot be considered property entitled to protection under the Fourteenth Amendment.[9] As Judge Cardozo once said,[10] membership in the bar "is a privilege burdened with conditions." One is admitted to the bar for something more than private gain. When admitted, the individual becomes an officer of the court and, like the court itself, an instrument or agency to advance the ends of justice. His co-operation with the court is due whenever justice would be imperilled if co-operation was withheld. While there may be a right to follow many of the common occupations of life, this right does not extend to the pursuit of professions or vocations of such nature as to require peculiar skill or special supervision for the protection of public welfare[11] for the con-

[8] The Canadian method is outlined in Can. Encyc. Dig., Ontario Ed., Vol. 1, p. 707, and in Can. Abridg., Vol. 4, p. 571. See also Wright, "Should the Profession Control Legal Education?" in 3 J. of Legal Ed. 1 (1950). The qualifications and the mode of admission of law agents in Scotland are set out in Encyc. Scot. Laws, Vol. 9, § 3, p. 24. See also a note in 72 Scot. L. Rev. 25 which discusses the reason for the dichotomy in the English system, the advantages of such a split, and what might be expected to follow from a fusion of the two branches of the profession.

[9] In re Egan, 52 S. D. 394, 218 N. W. 1 (1928); Kuckenbrod v. Mullins, 102 Utah 548, 133 P. (2d) 325, 114 A. L. R. 839 (1943).

[10] People ex rel. Karlin v. Culkin, 248 N. Y. 465 at 470, 162 N. E. 487 at 489, 60 A. L. R. 851 (1928). See also Matter of Rouss, 221 N. Y. 81, 116 N. E. 782 (1917).

[11] Board of Commissioners, Mississippi State Bar v. Collins, 214 Miss. 782, 50 So. (2d) 351 (1952).

stitutional reference to "life, liberty and property" does not comprehend every right and privilege known to the law.[12] The practice of law not being an absolute right, but a license and privilege in the nature of a franchise to be enjoyed only on proof, and maintenance, of fitness and other qualifications, it is difficult to see how any question of due process could ever be involved in matters of this nature unless the rules governing admission to the bar were of an arbitrary or capricious nature.

It having been established that there is no absolute right to practice law, it must now be determined who is to be the "protector" of the privilege and whether or not the privilege can be saddled with conditions or limitations of the nature complained about in the principal case. Much has been written on the point as to which branch of the government, whether the legislative or the judicial, has been invested with the right to prescribe the conditions for admission to the bar but, in all probability, the leading expression on the subject is contained in the opinion in the Illinois case entitled *In re Day*.[13] The court there said: "The function of determining whether one who seeks to become an officer of the courts and to conduct cases therein is sufficiently acquainted with the rules established by the legislature and the courts governing the rights of parties and under which justice is administered, pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact, and to bring the facts and law before the court so that a correct conclusion may be reached. The order of admission is the judgment of the court that he possesses the requisite qualification . . . The fact that the legislature may prescribe the qualifications of doctors, plumbers, and persons following other professions or callings, not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question."[14]

In accord with the view so expressed is a volume of precedent which generally establishes the fact that, under this doctrine of inherent power, it is the court which has control over the admission and call of attorneys.[15]

[12] Cummings v. Missouri, 71 U. S. (4 Wall.) 277, 18 L. Ed. 356 (1866).

[13] 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899). A graduate of an Illinois law school regarded by the court as a "diploma mill" there moved for admission, relying on a statute which purported to authorize the admission of graduates of law schools on diploma. The statute was declared to be unconstitutional and admission was denied.

[14] 181 Ill. 73 at 96-7, 54 N. E. 646 at 653.

[15] In re Secombe, 60 U. S. (19 How.) 9, 15 L. Ed. 565 (1856); Ex parte Garland, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366 (1866); In re Boone, 83 F. 944 (1897); Application of Fink, 109 F. Supp. 729 (1953); In re Lavine, 2 Cal. (2d) 324, 41 P. (2d) 161 (1935); People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941, 111 A. L. R. 1 (1937); State v. Mosher, 128 Iowa 82, 103 N. W. 105,

It should be noted, however, that while the court may have initial power with respect to admission, statutes which may have been passed, making provision to aid the judicial department in reaching a proper selection of those qualified for admission as attorneys, are not necessarily invalid. A Massachusetts court once indicated that if the statute did no more than provide the court with an appropriate instrumentality for the ascertainment of the qualifications of applicants, there would be no encroachment on the judicial department.[16] Statutes of this nature may be a convenient, if not an essential, way to enable the judicial department properly to perform its duties.[17] Very few jurisdictions today, therefore, hold that the matter of admission to the bar is completely within the power of one department of the government to the complete exclusion of the other and, generally speaking, there is a degree of co-operative effort on the part of the two; the legislature, acting under the police power, fixing minimum requirements for the protection of the public, with the judiciary, acting under its inherent power, serving to protect the administration of justice by the exercise of the control it possesses over attorneys as officials of the court.[18]

Since, as has been seen, the judicial department does have the power to control the matter of admission to the bar, it then becomes important to note what the courts have done to determine which, if any, of the applicants for admission are to be deemed eligible. The possession of a good moral character is perhaps the most important and universally

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5 Ann. Cas. 984 (1905); In re Norris, 60 Kan. 649, 57 P. 528 (1899); In re Steen, 160 Miss. 874, 134 So. 67 (1931); In re Thatcher, 80 Ohio St. 492, 89 N. E. 39 (1909); State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, 131 P. 703 (1912); Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Ann. St. Rep. 1030 (1909); State ex rel. Foster v. Washington State Bar Ass'n, 23 Wash. (2d) 800, 162 P. (2d) 261, 160 A. L. R. 1366 (1945); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932). See also Lee, "The Constitutional Power of the Courts over Admission to the Bar," 13 Harv. L. Rev. 233-55 (1899), and note in 8 Geo. Wash. L. Rev. 1085. The latter makes reference to the unusual situation existing in the District of Columbia. A few early cases may indicate otherwise for, in In re Cooper, 22 N. Y. 67, 20 How. Prac. 1 (1860), the court said the power to admit attorneys was not vested exclusively in the courts, and in Cohen v. Wright, 22 Cal. 293 (1863), the right to practice was said to be a "statutory right subject to the control of the legislature." See also Ex parte Yale, 24 Cal. 241, 81 Am. Dec. 62 (1865).

16 See In re Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1932).

17 For other cases so holding, see Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 165 A. 211, 87 A. L. R. 991 (1933), and People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A. L. R. 1006 (1928). Other decisions indicate that courts will recognize legislative acts regulating the practice of law only out of comity or generous acquiescence: Hanson v. Gratton, 84 Kan. 843, 115 P. 646, 34 L. R. A. (N. S.) 240 (1911); In re Greathouse, 189 Minn. 51, 248 N. W. 735 (1933); State v. Cannon, 196 Wis. 534, 221 N. W. 603 (1928).

18 A comprehensive study of the requirements for admission to practice in Illinois appears in Sprecher, "Admission to Practice Law in Illinois," 46 Ill. L. Rev. 811 (1952).

required qualification for admission.[19] The reason for this should be obvious for the relationship between attorney and client is one which involves the maximum of trust and confidence. As a consequence, it would not be unfair to require that the applicant's past life and conduct should have been such as to give assurance that he possesses the character and willingness to avoid wrongdoing.[20] A variety of methods designed to ascertain this fact have been developed in the past, many of which have not been too successful.[21] For this reason, there is a movement afoot, aimed at weeding out clearly undesirable applicants, to require the fingerprinting of those who seek admission to the bar.[22]

Digressing for a moment to comment on this latest development, it can be said that the fingerprinting of all applicants could eliminate the possibility of one person assuming the record of another[23] but fingerprinting is really a negative approach to the problem of assessing an applicant's character. The chief value thereof lies in its preventive effect in that, rather than serving to catch an applicant trying to conceal a criminal record, it would tend to keep such a person from ever applying for admission. The main criticisms directed against such a system would bear on the fact that it would be unfair to delay the fingerprinting until after the applicant had expended time and money completing his education and, to this point, no efficient system has been devised to cover the case of an applicant who erred earlier in his lifetime but has since rehabilitated himself. It is true that courts have the right to refuse admission because of prior bad character,[24] and that identification through fingerprinting is almost infallible, but there would appear to be no single device capable of demonstrating the applicant's character, or lack of it, short of an exhaustive and careful investigation.

19 Farley, "Character Investigation of Applicants for Admission," 24 Bar Exam. 147 (1955), elaborates on this point.

20 The question of what constitutes "good moral character" is not an easy one to resolve. See Starrs, "Considerations on Determination of Good Moral Character," 18 U. Det. L. J. 195 (1955).

21 See, for example, the ineffectiveness of requiring the applicant's own statement as to his past and of the requirement for the submission of character references by admitted attorneys as illustrated by the case of In re Hyra, 15 N. J. 252, 104 A. (2d) 609 (1954), noted in 33 CHICAGO-KENT LAW REVIEW 157.

22 A discussion of fingerprinting as a requirement for admission to the bar is contained in Hepburn, "Fingerprinting of Bar Applicants—Two-Way Protection," 33 U. Det. L. J. 37 (1955), and in Merritt, "Smokey the Bear—Guarding Law Schools and Lawyers," 42 A. B. A. J. 226 (1956).

23 In re Portnow, 253 App. Div. 395, 2 N. Y. S. (2d) 553 (1938).

24 Schware v. Board of Bar Examiners, 60 N. M. 304, 291 P. (2d) 607 (1955). As to whether or not a refusal to respond to questioning regarding Communistic affiliation or attachments would be a possible indication of bad character, hence would warrant denial of admission, see In re Anastaplo, 3 Ill. (2d) 471, 121 N. E. (2d) 826 (1954), cert. den. 348 U. S. 946, 75 S. Ct. 439, 99 L. Ed. 740 (1955).

Returning to the point at hand, it must be admitted that the next most important qualification which a candidate for admission should possess is one with respect to educational fitness. Except where the diploma privilege is still recognized, most candidates must submit to a bar examination, conducted independently of the educational program carried on in the schools, which serves to screen the product of the schools and, in general, leads to the rejection of those candidates not intellectually qualified. Again, however, this could lead to hardship in cases where the candidate, otherwise fully qualified, had been trained inadequately because the school he selected was not a competent one. Recognition of this fact led the American Bar Association, through its Section on Legal Education, to establish minimum standards for legal education and to set up the device of approving those schools which met such standards. If statistics could be made available, they would probably reveal that the percentage of success on the bar examination weighs heavily in favor of the candidates from those schools which have been so approved, with the candidates from the non-approved schools, or with apprentice-type training, usually failing to demonstrate the possession of the necessary intellectual qualifications.

Because of this, many courts have, by rule, set a requirement for admission to the bar or to the bar examination that the candidate be one who has been trained in an "approved" law school[25] although the determination of whether or not a particular school is one of approved character has frequently been left to the unguided judgment of the bar examining authority. In still more recent times, there has been a tendency to add the further requirement that the candidate should not only have been trained in but should also be a graduate of, or eligible to receive a degree from, an "approved" school.[26] Certainly, if a court may set attendance at, or graduation from, an "approved" school as a requirement for demonstrating one of the qualifications needed by a lawyer, the same court would have the power, as was exercised in the instant case, to specify what, in its judgment, should be the test of approval for such an institution.[27]

Prior to this, however, only one case has dealt with the precise point. In the case of *Nebraska ex rel. Ralston* v. *Turner*,[28] predicated upon a

[25] See Ill. Sup. Ct. Rule 58; Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 101.58, Part III(1).

[26] The graduation requirement was added to Ill. Rule 58 in 1952. Prior to that time, the applicant was permitted to take the examination on completion of 1296 classroom hours of law study without regard to whether he had or had not met the graduation requirements of the institution attended.

[27] See also Harno, "What is an 'Approved' Law School?" 23 Bar Exam. 20 (1953).

[28] 141 Neb. 556, 4 N. W. (2d) 302, 144 A. L. R. 138 (1942).

factual situation similar to the one in the instant case, the Nebraska Supreme Court not only vindicated the power of the court to control admission to the bar but also upheld a rule which differentiated between graduates of "reputable law schools," being those on the "approved list of the standardization agency of the American Bar Association," and students who had received their training in law offices, each of whom was eligible to take the bar examination, and those who were students or graduates of law schools not reputable within the meaning of the rule and who were, for this reason, not eligible for examination. The rule was said to be neither arbitrary, unreasonable, nor without rational basis. The instant case, achieving a similar result, tends not only to reinforce the position so taken but may foreshadow a course of future development under which all law schools will, perforce, have to meet accreditation standards or close their doors.[29]

This prospect should not be considered to be a displeasing one for, except as it may militate against "vested interests" in a few remaining "proprietary" law schools, there is no legitimate reason why, in the interest of strengthening the ranks of the bar, courts should not be free to work toward elevating the standards for admission.

A. M. ZOLLER

BANKRUPTCY—ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE—WHETHER ENTRUSTER, ACTING UNDER TRUST RECEIPT, MAY ASSERT LIEN IN EVENT TRUSTEE SELLS ENTRUSTED GOODS AND MINGLES PROCEEDS THEREOF WITH GENERAL ASSETS—Creditors engaging in the practice of extending credit on the basis of trust-receipt financing will be pleased with the decision of a United States District Court sitting in Tennessee in the recent case entitled *In the Matter of Harpeth Motors, Inc.*[1] In that case, the creditor, holder of a series of trust receipts each covering a separate automobile, discovered that the cars had been sold by the trustee-dealer who had, prior to bankruptcy, mingled the proceeds of sale with its other assets so as to make the same clearly unidentifiable. Following bankruptcy, the creditor filed a petition asserting a lien upon the assets in bankruptcy for the amount of the proceeds of sale. The referee disallowed this petition, holding that Section 10 of the Uni-

[29] No law school presently operating in Illinois would be affected as all such schools now have been granted accredited status by the Section of Legal Education of the American Bar Association.

[1] 135 F. Supp. 863 (1955).

form Trust Receipts Act[2] entitled the entruster to no more than a priority in the distribution of assets among general creditors. The entruster then petitioned the district judge for a review of this order. The District Court, following a review both of the applicable language of the Uniform Trust Receipts Act and that contained in the Bankruptcy Act,[3] concluded that the first of these statutes was intended to create a lien not only upon identifiable proceeds derived from the sale of entrusted goods but also upon the debtor-trustee's other assets in the event mingling occurred, so it thereupon granted relief to the entruster in accordance with such conclusion.[4]

The question presented in the instant case, while extremely narrow in scope, apparently called for the first judicial interpretation with respect to Section 10 of the Uniform Trust Receipts Act. Because the case was a novel one, however, it is unusual that the court, in view of the extremely technical and often confusing language of the statute, made little reference to the history underlying the Act or to the work of the annotators. In that connection, it may be noted that, as early as 1924, it was recommended that the trust receipt "should be recognized in the statute in the way the more clear-sighted banker now recognizes it, as a protection not against dishonesty, but only against insolvency of the borrower."[5] The framers of the Uniform Act apparently intended that the entruster should have a preferred position since they pointed out that, in cases of insolvency, the entruster should have "a preference for any proceeds of released security," made possible by Section 10(b).[6] It is also clear that this section is intended to apply to any untraceable proceeds for, by the next succeeding paragraph, one which states that, "at the same time," the entruster's common law right to traceable proceeds is preserved,[7] a degree of emphasis in this connection is added by the very fact that rights in traceable proceeds are treated separately. There is indication, then, that

[2] U. L. A., Vol. 9A, § 10, p. 308. The provisions of Ill. Rev. Stat. 1955, Vol. 2, Ch. 121½, § 175, are identical with Section 10 of the Uniform Trust Receipts Act except as to the concluding clause thereof, a clause concerning express and implied waiver of the entruster's rights, which provisions have been omitted from the Illinois version of the statute but have been retained in the Tennessee version: Tenn. Code Ann., 1950 Supp., § 7792.1, et seq.

[3] 11 U. S. C. A. § 104 accords priority only to certain classes of claims there enumerated but does not make mention of priorities or liens created by state law.

[4] The entruster's position was sustained as to only three of the trust receipts under which it had made timely demand for an accounting. Relief was denied with respect to other transactions because of a failure to make demand until more than ten days after sale of the secured articles had occurred.

[5] See Handbook, Nat. Conf. of Comm'rs on Uniform State Laws, p. 537, note 53.

[6] Commissioners' Prefatory Note to the Uniform Act, U. L. A., Vol. 9A, p. 279, Comment C, para. 7.

[7] Ibid., p. 280, Comment C, para. 8, referring to Section 10(c) of the statute.

an additional right, one not previously recognized but of a scope and extent as indicated by Section 10(b), has been created with intent to grant a new remedy with respect to untraceable proceeds. One writer who has provided an unusually exhaustive treatment of the complete Uniform Trust Receipts Act[8] also gives credence to this analysis for, in discussing Section 10(b) of the Act, he concludes, with regard to the entruster's rights, that: "If he can show that the proceeds from a sale were received by the trustee within ten days of (1) the appointment of a receiver or the filing by or against the trustee of a petition in bankruptcy or judicial insolvency, or (2) a demand by the entruster for a prompt accounting, he may receive the value of such proceeds even though they are not identifiable."[9] The foregoing comments, then, would indicate that there is ample support for the position taken by the court in the instant case.

The court goes farther, however, to support its position by examining closely the two basic issues to be determined in order to reach the conclusion it did. They are: (1) does the Uniform Act create a lien or a mere right of priority; and (2) if a lien is created, does it attach to money or other assets which are not identifiable proceeds from the entrusted goods? In respect to the first proposition, *i.e.* whether a lien is created, it is interesting to note that courts have often talked in terms of liens when interpreting this section of the statute[10] but the more carefully worded decisions prefer to use the term "security interest," in conformity with the language of the Uniform Trust Receipts Act.[11] In sharp contrast, the term "right of priority" is seldom used by the courts when discussing an entruster's rights. A right of priority, or more properly a right to prior payment from unincumbered assets, is "a narrow right to payment at a certain relative point in the distribution of a bankrupt debtor's property, naked of any power of levy or attachment; it is a creature of the Bankruptcy Act."[12] The court, in the instant case, made one final observation on this subject by pointing out that Section 10 of the Act, by providing the entruster with protection against subsequent

8 Heindl, "Trust Receipt Financing Under The Uniform Trust Receipts Act," 26 CHICAGO-KENT LAW REVIEW 197-268 (1948).

9 Ibid, at p. 259.

10 Peoples Finance and Thrift Co. of Visalia v. Bowman, 58 Cal. App. (2d) 729, 137 P. (2d) 729 (1943); Donn v. Auto Dealers Invest. Co., 385 Ill. 211, 52 N. E. (2d) 695 (1944); Commercial Credit Co. v. Horan, 325 Ill. App. 625, 60 N. E. (2d) 763 (1945); and Universal Credit Co. v. Citizens State Bank, 224 Ind. 1, 64 N. E. (2d) 28, 168 A. L. R. 352 (1945). The court in the instant case also appears to feel that the term "security interest" is synonymous with the term "lien." See 135 F. Supp. 863 at 867.

11 Chichester v. Commercial Credit Co., 37 Cal. App. (2d) 439, 99 P. (2d) 1083 (1940); Commercial Credit Co. v. Horan, 325 Ill. App. 625, 60 N. E. (2d) 763 (1945).

12 Moore's Collier on Bankruptcy, 14th Ed., Vol. 3, § 64.02, pp. 2055-6.

lien creditors, apparently intended that the entruster was to be regarded as a present lien creditor. Having reached the conclusion that the entruster was a lien creditor, an apparently sound conclusion, the court then proceeded to the heart of the problem, that of determining whether such a lien would attach to unidentifiable proceeds.

As would be expected, the court mentioned that liens traditionally have been regarded as giving to the lienor the right to have a debt satisfied out of a particular thing; a doctrine well understood both at common law[13] and under the Uniform Act, pursuant to which an entruster's right in and to identifiable proceeds has been upheld.[14] With regard to unidentifiable proceeds, however, the court was forced to rely entirely upon the wording of the statute and particularly upon a phrase in Section 10 which defines the entruster's position as being one to which he would be entitled "to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee."[15] Since this phrase qualifies all of the rights of an entruster conferred by Section 10, and since the entruster's right "to a priority to the amount of such proceeds or *value*"[16] follows in Section 10(b), the court logically concluded that the entruster's right to a hold on the value of unidentifiable proceeds was as good as it had been in identifiable proceeds at the moment of the disposition of the entrusted goods.

It would be a pleasant thing to conclude this discussion, if possible, with reference to another case, also of first impression, in complete harmony with the one mentioned and with the apparent intent of the statute. However, the cloud of a conflicting decision has already appeared upon the judicial horizon. In an even more recent decision reached by a United States District Court sitting in New York, there appears to be a challenge to the interpretation achieved by the court in Tennessee. During the course of its opinion in the case of *United States* v. *Profaci*,[17] the New York district court said, by way of obiter, concerning an entruster's rights, that the entruster could "neither identify the sale of this oil nor follow and

[13] Hamilton National Bank v. McCallum, 58 F. (2d) 912 (1932).

[14] Universal Credit Co. v. Citizens State Bank, 224 Ind. 1, 64 N. E. (2d) 28, 168 A. L. R. 352 (1945).

[15] U. L. A., Vol. 9A, § 10; Ill. Rev. Stat. 1955, Vol. 2, Ch. 121½, § 175.

[16] Italics supplied.

[17] 137 F. Supp. 795 (1955). The case concerned goods which had been warehoused and then released on the basis of trust receipt financing. Payment for these goods by the trustee had been made by a series of checks, the last one of which had been dishonored due to an attachment of the trustee's bank account by the United States in a tax lien foreclosure proceeding. The court indicated a belief that the trust receipt was nothing more than a promise to pay, so reached its decision against the entruster primarily on the basis of the law relating to sales. The result might have been different if the trustee had used the proceeds of his account to purchase bank drafts or cashier's checks payable to the entruster: General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928).

identify the funds received from the sale of this oil. Under these circumstances, the trust receipt cannot be recognized as a preference."[18] While the holding therein is not strictly in point, there is sufficient doubt cast upon the decision of the principal case to make it necessary that the future path of cases of this nature should be watched closely. Nevertheless, it would appear, from a study of the history of the Uniform Act, that the principal case is the better reasoned and more thoroughly analyzed one, hence the interpretation there provided for the particular section of the Uniform Trust Receipts Act is believed to be the one which should be followed in the future.

L. L. MAHONE

CONTRACTS—DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE—WHETHER PERFORMANCE CAN BE SAID TO BE IMPOSSIBLE IN LEGAL CONTEMPLATION WHEN IT CAN BE GIVEN ONLY AT AN EXCESSIVE AND UNREASONABLE COST—The scope of the doctrine relating to impossibility of performance of contracts was recently enlarged upon in the California case of *City of Vernon* v. *City of Los Angeles*.[1] By means of a proceeding for declaratory relief and injunction, the plaintiff city there sought to hold the defendant municipality to certain contracts under which the former had the right to discharge a specified amount of sewage into the sewer system of the latter. The plaintiff also sought to recover damages allegedly arising because of the defendant's negligent operation of the disposal facilities in such a manner as to produce the institution of abatement proceedings.[2] The defendant, because of a judgment against it in the action to abate the nuisance, had been forced to build disposal facilities far more expensive than those originally contemplated, so it sought relief from the terms of the original contract, relying on a claim of impossibility of performance. The trial court so held, but granted relief to the plaintiff by permitting it to use the new facilities following payment of its share of the installation cost.[3] The California Supreme Court affirmed this decision and, so doing, achieved the novel decision that a contract which, by its original terms, had become difficult to perform only because of an excessive and unreasonable expense not originally contemplated by the parties came within the ambit of the doctrine concerning impossibility of performance.[4]

[18] 137 F. Supp. 795 at 798.

[1] 45 Cal. (2d) 710, 290 P. (2d) 841 (1955). Carter, J., with Traynor J., concurring, wrote a vigorous dissenting opinion.

[2] See People v. City of Los Angeles, 83 Cal. App. (2d) 627, 189 P. (2d) 489 (1948).

[3] A portion of the dissenting opinion criticized the denial of damages occasioned by the alleged negligent operation of the disposal system on the ground the breach by the defendant of its contractual duties had occurred before the existence of those conditions which, the majority opinion said, had excused the performance of those duties.

[4] The California Supreme Court did find error in the trial court determination that the earlier abatement action had operated, by way of *res judicata*, to settle

Courts have heretofore been reluctant to relieve a promisor from an obligation which, on the face of his contract, he has apparently assumed because of a belief in the possibility that the promisor would have consented to be bound anyway in the event the contingency which makes performance difficult or impossible had presented itself to the minds of the contracting parties.[5] This fear that someone may be allowed to escape from an obligation he has, in fact, assumed has given rise to a tendency to hold the promissor to the literal terms of his contract, regardless of the hardships which may be involved, on the ground he could be said to have made an "absolute" promise. This tendency may stem from the early English case of *Paradine* v. *Jane*,[6] where it was said that impossibility of performance should not excuse the promisor, for he might have guarded against such a contingency in his contract.

Since the case of *Taylor* v. *Caldwell*,[7] however, the courts have been willing to avoid too strict an application of the aforementioned rule, with the result that several exceptions have come to be recognized. It has been decided, for example, that performance of a contract for personal services will be excused by the death or serious illness of the promisor;[8] that one may be excused his failure to fulfill a promise whenever some supervening statute or rule of law makes such performance impossible;[9] and performance may be excused in the event of a fortuitous destruction or non-existence of an essential subject matter.[10] In addition, two other situations have been brought within the circle of impossibility, to-wit: (1) where the contract contemplates some particular mode of performance and that method of performance becomes impossible; and (2) where the entire purpose and motivation for the contract is "frustrated" by some change in the surrounding circumstances.[11]

Commenting upon this situation Williston has said: "It is the difference between 'the thing cannot be done,' and 'I cannot do it.' The first is called objective, the second is called subjective."[12] Subjective impossi-

all issues relating to the contracts in question. It did, however, uphold the trial court on its further determination that performance of the contracts had been excused by the intervening impossibility.

5 Grismore, Contracts (The Bobbs-Merrill Co., Indianapolis, 1947), § 169.

6 Aleyn 26, 82 Eng. Rep. 897 (1646).

7 3 Best & Smith 826, 122 Eng. Rep. 309 (1863).

8 Williams v. Butler, 59 Ind. App. 47, 105 N. E. 387 (1914); Cutler v. United Shoe Mach. Co., 274 Mass. 341, 174 N. E. 507 (1931). See also Restatement, Contracts, § 459.

9 Gammon v. Balisdell, 45 Kan. 221, 25 P. 580 (1891); Restatement, Contracts, § 458.

10 Polk Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432 (1909); Matousek v. Galigan, 104 Neb. 731, 168 N. W. 510 (1920). See also Restatement, Contracts, §§ 281 and 460.

11 Williston, Contracts, Rev. Ed., Vol. 6, § 1935.

12 Williston, op cit., § 1932.

bility would not, ordinarily, excuse non-performance of a contract, whereas objective impossibility would do so.[13] The principal case, on its facts, would seem to fall within the subjective classification and, when measured by ordinary doctrines, would appear to produce an erroneous result for, when a person, by his contract, charges himself with an obligation possible to be performed, he must perform or suffer the consequences.[14] If he desires to be excused from performance, he must so provide in the contract itself[15] and, absent such a stipulation, performance will not be excused simply because performance will require some unusual or unexpected expense.[16]

The doctrine accepted in the principal case, to-wit: that extreme and unforeseen difficulties and expense which tend to render performance impracticable may serve to discharge the promisor, is of recent innovation, has not yet gained a firm foothold in the law, and its existence may well be a tenuous one.[17] By extending the doctrine of impossibility of performance to cases where performance is merely made more difficult because of an expense not originally contemplated by the parties, the court is placing the risk of such fortuitous events on the promisee, apparently because it considers that, in view of the increasing unpredictability of life in a complex society, the destruction of the promisee's expectations would be preferable to the imposition of a severe economic loss on the promisor.[18] There is genuine reason to doubt the validity of such a holding.

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13 Fast, Inc. v. Shaner, 183 F. (2d) 504 (1950).

14 Hal Roach Studios v. Film Classics, 156 F. (2d) 596 (1946); Pioneer Life Ins. Co. v. Alliance Life Ins. Co., 374 Ill. 576, 30 N. E. (2d) 66 (1940); Berline v. Waldschmidt, 159 Kan. 585, 156 P. (2d) 865 (1945); Ellis Gray Mill Co. v. Sheppard, 359 Mo. 505, 222 S. W. (2d) 742 (1949); O'Neil Const. Co. v. City of Philadelphia, 335 Pa. 359, 6 A. (2d) 525 (1939).

15 Gulf, M. & O. R. Co. v. Illinois Cent. R. Co., 128 F. Supp. 311 (1954), affirmed in 225 F. (2d) 816 (1955); Hensler v. City of Los Angeles, 124 Cal. App. (2d) 71, 268 P. (2d) 12 (1954); Ryan Co. v. Sanitary Dist. of Chicago, 317 Ill. App. 549, 47 N. E. (2d) 576 (1943), affirmed in 390 Ill. 173, 60 N. E. (2d) 889 (1945); Bunch v. Potter, 123 W. Va. 528, 17 S. E. (2d) 438 (1941).

16 Megan v. Updike Grain Corp., 94 F. (2d) 551 (1938); Farmer's Fertilizer Co. v. Lillie, 18 F. (2d) 197, 52 A. L. R. 552 (1927); Pahulski v. Ludwiczewski, 291 Mich. 502, 289 N. W. 231 (1939); Borough v. Swarthmore v. Philadelphia Rapid Transit Co., 280 Pa. 70, 124 A. 343, 33 A. L. R. 128 (1924).

17 Another, and much critized, theory is that all promises, even though unconditional in their terms, should be deemed to be subject to a constructive condition to the effect that performance will be excused, if circumstances should arise which would make performance difficult or impossible, provided the promisor did not expressly assume the risk of such impossibility. See Page, "The Development of the Doctrine of Impossibility of Performance," 18 Mich. L. Rev. 589 (1920).

18 A policy with respect to a degree of economic fairness to a promisor is apt to be carried further in cases of temporary impossibility: Restatement, Contracts, § 462. If, however, the promisee has changed his position in reliance upon the promise, the incidence of the risk should not be determined without giving consideration to that factor.

COURTS—UNITED STATES COURTS—WHETHER FEDERAL COURTS POSSESS JURISDICTION TO RESTRAIN FEDERAL AGENTS FROM TESTIFYING, AND USING EVIDENCE ILLEGALLY SEIZED BY THEM, IN STATE COURT PROCEEDINGS—Following arrest and indictment for an alleged violation of a federal statute relating to narcotics,[1] the petitioner in *Rea* v. *United States*[2] moved to suppress certain evidence which had been seized under a search warrant because of defects in the warrant[3] and, when his motion was sustained, the federal prosecution was abandoned. The federal agent concerned, however, thereafter caused the petitioner to be prosecuted in an appropriate state court, intending there to testify and use the same evidence in support of an alleged violation of state law. The petitioner thereupon applied to the federal district court which had been concerned with the initial proceeding and moved it to enjoin the federal agent from so testifying as well as to compel the return, to the federal court, of the illegally seized evidence.[4] Relief of this nature was denied to him in the district court and in the Court of Appeals for the Tenth Circuit, but the United States Supreme Court, on certiorari, although divided five to four, reversed the lower court holdings on the ground that the federal agent was not to be permitted to use the fruits of his unlawful seizure either in federal or in state court proceedings.

Although the holding in the instant case will probably have a limited degree of utility, it provides a further illustration of the difficulties which attach as the result of the conflict between the federal courts and most state courts over the matter of admissibility of evidence obtained by an illegal search and seizure. The point is not one of constitutional significance for Mr. Justice Douglas, speaking for the majority of the court, avoided all consideration of constitutional questions in disposing of the case. The line of reasoning employed, however, is somewhat disturbing, if removed from the limitations of the case itself, because of possible future applications. The process of this reasoning may be set forth briefly as follows: (1) the federal courts sit to police the Federal Rules of Criminal Procedure and to

[1] The prosecution was based on 26 U. S. C. A. § 2593(a).

[2] 350 U. S. 214, 76 S. Ct. 292, 100 L. Ed. (adv.) 213 (1956), reversing 218 F. (2d) 237 (1954). Justice Harlan wrote a dissenting opinion which was concurred in by Justices Reed, Burton and Minton.

[3] The warrant was issued pursuant to Rule 41(a) of the Rules of Criminal Procedure, 18 U. S. C. A., but it was said to be defective for non-compliance with Rule 41(c), in that the affidavit, under which the warrant was issued, was based on unsworn statements.

[4] The procedure followed by petitioner seems to have rested on 28 U. S. C. A. § 2463, which directs that property taken or detained, when of the character of contraband, shall not be repleviable but shall be "in the custody of the law" and subject only to the "orders and decrees of the courts of the United States" having jurisdiction thereof.

see to it that they are observed; (2) this policing or supervision extends to process issuing from the federal courts; (3) the rules are designed to serve as standards for federal law enforcement officers; consequently, (4) a federal agent who has obtained evidence in violation of any federal rule pertaining to searches and seizures is subject to federal judicial control; with the result (5) that a federal court may enjoin such federal agent from testifying in a state court with respect to the evidence so obtained, as a necessary adjunct to its supervisory control.[5] The novelty of these propositions is suggested from the fact that there is only one case, that of *Wise* v. *Henkel*,[6] an hitherto rather inconspicuous 1911 decision,[7] which can be cited in support thereof, and it relates more nearly to matters arising in a federal court, so the extract taken therefrom loses strength when applied to the situation revealed in the case at hand.

This is not to say that the case was incorrectly decided, for the court could have reached the same decision without standing on such tenuous ground. It has been said, for example, that a federal court "has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein."[8] In addition, the ancillary jurisdiction of federal courts generally extends to proceedings concerned with the pleadings, processes, records or judgments of the court in the principal case or to proceedings which "affect property already in the court's custody."[9] It is crucial, therefore, to note that the property seized as evidence in the case at hand had originally been brought within the power of a federal court. It is true that the district court had entered an

[5] As to supervisory power over federal law enforcement agencies in general, see the case of McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943). But the court there expressly excluded any extension beyond that of reviewing the "standards formulated and applied by federal courts in the trial of federal cases." See 318 U. S. 332 at 347, 63 S. Ct. 608 at 616, 87 L. Ed. 819 at 829.

[6] 220 U. S. 556, 31 S. Ct. 599, 55 L. Ed. 581 (1911). A district attorney was there held in contempt by a federal court for not obeying an order to return certain property illegally seized. The Supreme Court affirmed a denial of a writ of habeas corpus.

[7] Reference has been made to the holding in Wise v. Henkel, cited in the preceding footnote, only six times since it was decided more than forty-five years ago. See the opinions in Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931); Pothier v. Rodman, 261 U. S. 306, 43 S. Ct. 372, 67 L. Ed. 670 (1922); Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914); Cogen v. United States, 24 F. (2d) 308 (1928); United States v. Hee, 219 F. 1020 (1915); and State v. Wantropski, 98 W. Va. 124, 126 S. E. 496 (1925). Not one of these cases suggests any right of control over the activities of federal law enforcement officers other than that which relates to proceedings actually being conducted before a federal court.

[8] Local Loan Co. v. Hunt, 292 U. S. 234 at 239, 54 S. Ct. 695 at 697, 78 L. Ed. 1230 at 1232 (1933).

[9] Cooperative Transit Co. v. West Penn. Electric Co., 132 F. (2d) 720 at 723 (1943).

order which did no more than suppress the evidence without acting with respect to the disposition to be made of the seized property,[10] but the property was nevertheless still subject to the further orders of the court[11] so the federal agent had no right to make any disposition of the material without the sanction of the federal court. As the property had not been ordered surrendered, the federal agent controlling the same was clearly left open to the orders of the federal court with respect thereto.[12]

While recognizing that the decision in the instant case expressly excludes any consideration of the constitutional aspects involved in searches and seizures, the net effect it has cannot be ignored when attention is given to this facet of the law, so the case must be added to the already established law in this field if one is to fairly and clearly set forth the principles thereof and their applicability. The Fourth Amendment to the United States Constitution, of course, guarantees the right of an individual to be secure against unreasonable searches and seizures. To guard against the infringement of this right, the United States Supreme Court, in the case of *Weeks* v. *United States*,[13] prohibited the introduction into evidence of the fruits of such searches, made by federal officers, provided timely objection was made. While the matter of inadmissibility was, at first, interpreted to be a by-product of the command of the Fourth Amendment, the principle has since been codified in the form of Rule 41(e) of the Federal Rules of Criminal Procedure[14] which, seemingly, follows the Fourth Amendment from judicial implication rather than because of command.[15] As a consequence, it has been held that evidence, even when illegally obtained, is admissible in a federal court if it was obtained illegally by state officers acting independently of federal officers, without any participation therein by the latter and without any agreement with respect to such evidence, despite the fact there may have been "a general understanding that evidence would be exchanged" among the two government agencies.[16] Under the holding achieved in the instant case, however, the incongruous situation now exists wherein evidence illegally obtained by a state official may be admitted in a

[10] The petitioner's original motion had sought (1) suppression of the evidence together with an order denying its use as evidence in any prosecution against him, and (2) an order directing the disposition to be made of the property. The district court only entered an order suppressing the evidence: Rea v. United States, 218 F. (2d) 237 at 238.

[11] 28 U. S. C. A. § 2463.

[12] Even though there is a power to act, the federal courts have generally, as a matter of discretion, abstained from acting when to do so would affect the delicate balance between the federal and the state court systems: Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951).

[13] 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

[14] See 18 U. S. C. A., Rule 41 (e).

[15] Wolfe v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

[16] Wharton, Criminal Evidence, Vol. 2, § 700, and cases there cited.

federal court[17] but, conversely, a federal official who had illegally obtained evidence may be enjoined from testifying in a state court although there may be no comparable state rule prohibiting it.

The due process clause of the Fourteenth Amendment, often interpreted to be a form of "shorthand" for the first eight amendments,[18] would seem to preclude state authority from violating the rights against unreasonable searches and seizures. Nevertheless, it has been established that evidence so obtained, in the absence of any contrary state rule, may be admitted in state courts for the United States Supreme Court has refused to prohibit the admission of such evidence[19] or to overrule decisions that may have been based thereupon.[20] It is true that a state must protect its citizens in some manner from unreasonable searches and seizures but this does not necessarily extend to the point of prohibiting the introduction of evidence so obtained in a criminal trial.[21] Now, however, by virtue of the holding in the instant case, a state which would have permitted the use of evidence secured as the result of an illegal seizure cannot expect to have the benefit of the testimony of any federal officer, at least with respect to that evidence which has previously been offered in, and had been suppressed by, a federal court. The problem is, to some degree, a matter of moot concern to Illinois for the doctrine of the Weeks case[22] is generally followed in this state,[23] even though there is a disposition to admit illegally obtained evidence provided it is proffered by someone other than a state official.[24]

It is interesting to speculate, as did Justice Harlan in his dissent in the case at hand, with regard to the dilemmas which can follow from future applications of the holding therein. As the majority relied on the premise that federal courts sit to enforce federal law, and federal law extends to the process issuing from such courts, what would the court say in the event

17 Lustig v. United States, 338 U. S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949). See also note in 51 Col. L. Rev. 129.

18 Wolfe v. Colorado, 338 U. S. 25 at 26, 69 S. Ct. 1359 at 1360, 93 L. Ed. 1782 at 1785 (1949).

19 Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951).

20 Wolfe v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

21 The common law protection took the form of providing for an action for damages against the searching officer, against one who procured a warrant maliciously and without probable cause, or against a person who assisted in the execution of the illegal search. The person subjected to the illegal act also had the right, without liability, to use proper force to resist the unlawful search.

22 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

23 People v. Grad, 385 Ill. 584, 53 N. E. (2d) 591 (1944); People v. Dent, 371 Ill. 33, 19 N. E. (2d) 1020 (1939); People v. Lind, 370 Ill. 131, 18 N. E. (2d) 189 (1939); People v. Duchant, 370 Ill. 650, 19 N. E. (2d) 590 (1939); People v. Castree, 311 Ill. 392, 143 N. E. 112 (1924); People v. Brocamp, 307 Ill. 448, 138 N. E. 728 (1923).

24 People v. Touhy, 361 Ill. 332, 197 N. E. 849 (1935).

no search warrant, rather than a defective warrant, had been issued? The majority of the court also relied on the fact that the district court was not asked to enjoin state officials nor in any way to interfere with state agencies in their enforcement of state law. What, then, would the court have done hade the petitioner at hand been convicted in the state court by the use made of the illegally seized evidence? One can well foresee a race developing hereafter between a state prosecution utilizing the illegally seized evidence on the one hand and a federal injunction proceeding against the federal agents who seized the evidence on the other.

While the majority opinion in the Rea case employs broad language, the important limiting feature that a federal court had exercised a prior jurisdiction over the parties to the controversy and had a continuing control with respect to the property should not be overlooked. It would seem that, in the absence of these elements, the result would have been fatal to the petition. If questions of this sort are to be avoided, steps should be taken to see to it that illegally seized evidence should be treated as inadmissible in all courts and at all times without regard to the official or unofficial character of the person obtaining the same and without regard to the nature of the tribunal to which such evidence is first presented.

R. I. PEREGRINE

CUSTOMS DUTIES—VIOLATION OF CUSTOMS LAWS—WHETHER PASSENGER OF FOREIGN PLANE IN INTERNATIONAL FLIGHT WHO IS FORCED TO LAND IN THE UNITED STATES BECAUSE OF INCLEMENT WEATHER MUST DECLARE DUTIABLE ARTCLES—The claimant in the case entitled *United States* v. *532.33 Carats, More or Less, of Cut and Polished Diamonds,*[1] was travelling by airplane from Germany to Bermuda via France and Canada with a packet of diamonds but with no intent to land in the United States nor to import property thereto. Unforeseen weather conditions forced the plane to bypass Canada and to proceed directly to the United States, where claimant deplaned. Insisting on reaching his Canadian transfer point, the claimant immediately made arrangements with a commercial airline to be taken to Canada by the first available transportation. Before he could leave, claimant was approached by customs officers, at which time he failed to declare the diamonds he was carrying on his person.[2] The customs officers dis-

[1] 137 F. Supp. 527 (1955).

[2] 19 U. S. C. A., § 1498(a)(6), authorizes the Secretary of Treasury to prescribe rules and regulations "for the declaration and entry of . . . (6) Articles carried on the person or contained in the baggage of a person arriving in the United States." Pursuant thereto, the Secretary of Treasury issued a regulation, 19 C. F. R. 10.19(a), to the effect that all "articles brought into the United States by any individual shall be declared to a customs officer."

covered that the diamonds were on the claimant,[3] took the jewels into their possession, and instituted forfeiture proceedings.[4] On motion for summary judgment,[5] the federal district court declared the claimant's diamonds were subject to forfeiture, stating the claimant's lack of intent to enter the United States or to leave the diamonds therein was irrelevant in the face of the requirement for rigid adherence to the demand for disclosure set forth in the customs statute and regulations.

There are no prior cases which determine the rights or immunities from local jurisdiction enjoyed by passengers in distressed airplanes which may be forced to cross the territorial boundaries of the United States for the purpose of seeking shelter. There are, however, several decisions which enunciate a doctrine of international law granting a degree of immunity from local jurisdiction to those distressed ships which may be forced to seek shelter in foreign territorial waters.[6] In that connection, it has been said that there is "one condition under which a foreign vessel in territorial waters may claim as of right an entire immunity from the local jurisdiction. The condition is that such presence in territorial waters be due to *force majeure*. If a ship is driven in by a storm, carried in by a mutineer, or seeks refuge for vital repairs or provisions, international law declares that the local state shall not take advantage of its necessity."[7]

While no opportunity has presented itself for a court of the United States to apply this "distressed ship" doctrine to an airplane forced to land on account of mechanical difficulties or inclement flying weather, at least one Canadian decision, that in the case of *Pentz, Claimant, and His Majesty the King*,[8] has held that an airplane in international flight, forced to land to avoid a crash, is justified in landing at any place where such landing can be safely made for much the same reasons as would justify a vessel in distress to enter a foreign port. In the light of the American acceptance of the "distressed ship" doctrine, it is plausible to assume that a United States court would award to a distressed airplane the same degree of immunity as is afforded to surface ships under similar circumstances. It is true that these cases, in no way, have determined the rights of individual passengers

[3] The means by which the customs officers gained this knowledge is not revealed in the opinion written by the district judge.

[4] 19 U. S. C. A., § 1497, reads in part as follows: "Any article not included in the declaration and entry as made . . . shall be subjected to forfeiture."

[5] See 28 U. S. C. A., Rule 56(a).

[6] The New York, 16 U. S. (3 Wheat.) 59, 4 L. Ed. 333 (1818); The Louise F., 293 F. 933 (1923); Thomson v. United States, 23 Fed. Cas. 1107, Fed. Cas. 13,985 (1820); United States v. United Mexican States, Opinions of the Commissioners (1929), p. 174.

[7] Jessup, Laws of Territorial Waters and Maritime Jurisdiction (F. A. Jennings Co., Inc., New York, 1927), p. 194.

[8] [1931] Ex. Can. Rep. 172.

aboard ships or airplanes so forced to seek shelter in foreign territory, but there is reason to believe they should serve as a guide in determining the jurisdictional limits to be exercised over persons who come within the United States boundaries contrary to their intention or reasonable expectation.

The expanding use of air travel in international peregrination has prompted the United States government to participate in several conferences aimed at developing a uniform air travel agreement. At the International Civil Aviation Convention of 1944, held in Chicago, two agreements were achieved, one dealing with air services transit and the other with air transport. Under these compacts, the contracting parties have agreed to permit air flight over each other's territory (a) without landing, (b) landing for non-traffic problems, *i.e.*, to refuel and repair, and (c) landing to take on passengers, mail, and baggage destined to the state whose nationality the aircraft possesses or to any other territory of any other contracting state.[9] Another and somewhat similar agreement had been signed by the United States at the Pan American Convention.[10] While these agreements do not specifically cover problems with respect to distressed aircraft forced to land, or the duties of passengers who deplane from such aircraft, it should be noted that they do contain provisions to the effect that landings made *pursuant* to these agreements must conform to customs regulations.

There being no controlling international agreement or treaty to which the court could turn to reach its decision, and because of an apparent unwillingness to extend the "distressed ship" doctrine, if this phase of international law was even considered, the federal district court relied solely on its interpretation of the customs laws. Two sections thereof should be noted in that connection; one conferring power on the collector to examine baggage of any person arriving in the United States, whether such baggage is subject to duty, free of duty, or prohibited, notwithstanding a declaration and entry thereof has been made; and the other which confers authority on the Secretary of Treasury to prescribe rules and regulations for declaration and entry of articles carried on a person or contained in the baggage of a person arriving in the United States.[11] The Secretary of Treasury, under the authority granted in this latter section, has prescribed by regulation that all articles "brought into the United States by any individual shall be declared to a customs officer."[12] Under both of these sections, the statute requires that the person who is to be subject to the customs law should "arrive" in the United States. The question arises, there-

[9] Cooper, "The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport," 14 J. Air L. and Comm., 125-49 (1947).

[10] See T. D. 46898, 65 Treas. Dec. 256 (1934).

[11] 19 U. S. C. A., §§ 1496 and 1498.

[12] 19 C. F. R. 10.19(a).

fore, whether a person such as the claimant in the instant case could be said to have "arrived" in the United States within the meaning of the statute and the regulations.

It is clear that mere physical presence within a given area is not enough for this purpose. In *Toler* v. *White*,[13] for example, it was said that a mere touching of port did not constitute an arrival within the meaning of an act which required every master of a vessel belonging to a United States citizen, upon his arrival in a foreign port, to submit his register, sea letter, and Mediterranean passport to the consul at such port. In the more recent case of *In re Kempson*,[14] the court stated that an alien had not "arrived", within the meaning of an immigration act, until entry had been made in compliance with legal requirements and legal residence had begun. Analogous situations exist with respect to the fact that an entry of an alien is required before he can be subject to deportation,[15] in which cases the courts have held that entry is not made until the alien is freed from restraint so he may physically enter the country. Of more importance, however, would seem to be the case of *Thomas* v. *United States*,[16] wherein the court held that the mere act of crossing the territorial limits would constitute an arrival *except* in those instances where the "distressed ship" doctrine of international law would be applicable. Before an arrival could be said to have been made, therefore, there must be an intent to do something more than merely seek a temporary refuge.

Nevertheless, the court in the instant case ruled that the statute and the regulation in question required that any person who merely crossed the United States border should show what it was he brought with him.[17] This interpretation, while innocent at first blush, could have far-reaching effects. It is conceivable that, under this ruling, passengers of airplanes in uninterrupted international flight who merely fly over the territory of the United States could be required to declare dutiable articles merely because they had crossed, for a brief moment, into American territory. As this would seem to be carrying national law to a ridiculous length, it can only be said that the court appears to have taken too harsh a position in a case of first impression. It could have taken a more realistic and a less chauvinistic approach had it seen fit to interpret the customs laws in the light of the "distressed ship" doctrine.

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[13] 24 Fed. Cas. 3, Fed. Cas. 14,079 (1834).

[14] 14 F. (2d) 668 (1926).

[15] United States ex rel. Schirrmeister v. Watkins, 171 F. (2d) 858 (1949); United States ex rel. Patton v. Tod, 297 F. 385 (1924); Ex parte Chow Chok, 161 F. 627 (1908); In re Simmiolkjier, 71 F. Supp. 553 (1947).

[16] 23 Fed. Cas. 1107, Fed. Cas. 13,985 (1923).

[17] See 137 F. Supp. 527, particularly p. 529.

FEDERAL CIVIL PROCEDURE—DEPOSITIONS AND DISCOVERY—WHETHER OR NOT A STATE STATUTORY PRIVILEGE ACCORDED CERTIFIED PUBLIC ACCOUNTANT AGAINST COMPULSORY DISCLOSURE IS APPLICABLE TO PROCEEDINGS IN A FEDERAL COURT—An interesting question relating to the applicability of state law in a federal court proceeding was involved in the recent case of *Palmer* v. *Fisher*.[1] The appellant therein, a defendant in a case pending before a federal court sitting in Florida, was anxious to secure the testimony of the appellee, a certified public accountant who resided in Illinois, so she obtained a subpoena *duces tecum* for this purpose from a federal district court sitting in Illinois. This subpoena purportedly directed the appellee to give his deposition concerning an audit and a written report made by him from the business records and papers of a corporation involved in the Florida litigation. Following service of the subpoena on the appellee,[2] a partial deposition was taken and the matter continued. Upon arrival of the continuance date, the appellee, on the advice of counsel, refused to complete the deposition, invoking a privilege against disclosure of information obtained in his professional capacity pursuant to an Illinois statute[3] and also challenging the validity of the service of the subpoena.[4] Proceedings were then taken to cite the appellee for contempt of court but the federal district court, instead, not only quashed the subpoena but also required appellant to surrender all copies of the deposition so partly made for destruction. The United States Court of Appeals for the Seventh Circuit, on appeal to it, affirmed the order when it gave effect to the Illinois statute even though federal courts would not generally recognize any similar privilege with respect to accountants.

In the absence of statute, courts of law rarely extend a privilege beyond the common law protection given to private communications, the right to immunity being at best only an equitable one,[5] for it is the policy of law to require a full disclosure of information by witnesses so that justice might prevail. Pursuant to this policy, the granting of any privilege

1 228 F. (2d) 603 (1956). Finnegan, J., dissented on the ground the order in question was lacking in appealable character.

2 The record indicated that the appellee was invited to the Chicago office of the appellant's attorney, ostensibly to discuss the Florida case. On arrival there, service was made and the appellee was told he would then and there have to testify under oath.

3 Ill. Rev. Stat. 1955, Vol. 2, Ch. 110½, § 51, states: "A public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as a public accountant."

4 See, in that connection, Fed. Rules Civ. Pro., Rule 30(a).

5 Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399 (1878); United States v. Levy, 153 F. (2d) 997 (1946); Mattes v. United States, 79 F. (2d) 127 (1935); United States v. Weinberg, 65 F. (2d) 394 (1933); Sherwin v. United States, 297 F. 704 (1924); People v. McCormack, 278 App. Div. 191, 104 N. Y. S. (2d) 139 (1952).

against disclosure constitutes no more than an exception to the fundamental general rule. The mere fact, therefore, that a communication has been made under an express or implied confidential relationship is not enough to create a privilege[6] for no pledge of privacy nor oath of secrecy can avail against a demand for the truth and the whole truth in a court of justice except in the case of the historic four privileges which pertain to confidential communications between client and lawyer, between husband and wife, between priest and penitent, and between physician and patient.[7]

It is true that obligations of honor were often put forward as grounds for silence in certain English trials in the early 1600's[8] and, by the middle of the Seventeenth Century, it seemed as though this notion would prevail.[9] The trend in this direction sharply reversed itself thereafter and, by the middle of the Eighteenth Century, a privilege based on a point of honor disappeared.[10] Today, therefore, the chief grounds on which a privilege from disclosure may be invoked in an English court will be limited to cases involving one of the professional privileges aforementioned, those in which disclosure would tend to incriminate the party or expose him to a forfeiture, those where disclosure would be contrary to public policy, and, with respect to documents, those where the documents are not in the witness' possession but are held by him as an agent.[11] The accountant-client relationship, of course, would not fall within any of these categories yet, in *Tournier* v. *National Provincial and Union Bank of England*,[12] a qualified privilege was recognized which might some day serve as the basis by which members of this group may acquire the privilege accorded to the classical professions.

6 Clein v. State, — Fla. —, 52 So. (2d) 117 (1951); People ex rel. Mooney v. Sheriff of N. Y. County, 269 N. Y. 291, 199 N. E. 415 (1936).

7 See in that regard, the American Law Institute Model Code of Evidence (1942). A report by the Committee on Improvements in the Law of Evidence, 63 Am. Bar Rep. (1938), at p. 595, also suggests that the "correct tendency would rather be to cut down the scope of the existing privileges, instead of to create any new ones."

8 Countess of Shrewsberry Case, 12 Rep. 94, 77 Eng. Rep. 1369 (1613); Wilson v. Rastell, 4 T. R. 753, 100 Eng. Rep. 1283 (1613).

9 Bulstrod v. Letchmere, 1 Chan. Cas. 277, 22 Eng. Rep. 799 (1676); Lord Grey's Trial, 9 How. St. Tr. 127 (1682).

10 In Duchess of Kingston's Case, 20 How. St. Tr. 586 (1776), the witness was bound by law to answer all questions put to him. See also Hill's Trial, 20 How. St. Tr. 1362 (1777).

11 Spokes v. Grosvenor Hotel Co., 2 Q. B. 124, 132 C. A. (1898); Reid v. Langlois, 1 Mac. & G. 627, 47 Eng. Rep. 1596 (1849); Greenough v. Gaskell, 1 My. & K. 98, 39 Eng. Rep. 618 (1833).

12 [1924] 1 K. B. 461. The court there held that a duty owed by a bank to a customer not to disclose his affairs was a contractual legal duty which was qualified by a requirement to disclose under compulsion of law, or where the bank's interests required disclosure, or where the customer consented. See also Chantrey Martin & Co. v. Martin, 2 Q. B. 286 (1953).

Privilege having been defined as a special grant from the sovereignty, it would seem, then, that some type of necessary special permission or consent must be found which the sovereign in its discretion, might withhold or fail to provide. Since, in this country, sovereignty generally resides in the people acting through the duly elected representatives, legislation has been deemed essential in order to establish any new privileges[13] and, as a consequence, it is only in extreme cases that courts should recognize instances of privilege against testimony or the production of evidence which have not been provided for by constitutional or statutory provisions.[14] Thus, in the absence of a statute specifically denominating accountant-client transactions as being privileged, no testimonial disqualification would attach to such matters. In harmony with these ideas, twelve states including Illinois and one of the territories have enacted statutes recognizing the privileged nature of communications between an accountant and his client[15] but the federal courts, acting on their own accord, have not recognized any such general privilege.[16]

Nevertheless, as the instant case would indicate, a question may arise as to whether or not a federal court should grant recognition to a testimonial privilege[17] of this nature when the same has been sanctioned by an appropriate state statute. Prior to the adoption of the present Federal

[13] A statute which made certain communications privileged would be a mere rule of evidence, not one of substantive law, hence would not violate the terms of the Fourteenth Amendment, according to the case of Yazoo & M. V. R. Co. v. Decker, 150 Miss. 621, 116 So. 287 (1928).

[14] Scolavino v. State, 187 Misc. 253, 62 N. Y. S. (2d) 17 (1946). Wigmore, Evidence, Vol. 8, § 2285, suggests that even then no privilege should be acknowledged to exist unless the case involves all four of the elements he mentions, to-wit: "The communications must originate in a confidence that they will not be disclosed; this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; the relation must be one which in the opinion of the community ought to be sedulously fostered; and the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation."

[15] Ariz. Code Ann. 1939, § 67-609; Colo. Rev. Stat. 1953, § 642; Ga. Rev. Stat. 1943, § 84-216; Fla. Stat. Ann. 1941, § 3933; Ill. Rev. Stat. 1955, Vol. 2, Ch. 110½, § 51; Iowa Code Ann. 1931, § 1905; Ky. Rev. Stat. 1953, § 210.20; West La. Rev. Stat., § 37.85; Flack Md. Code Ann. 1951, Art. 75A; Mich. Stat. Ann. 1948, § 338.523; N. M. Stat. Ann. 1953, § 45-512; Williams Tenn. Code Ann. 1939, § 62-114; Puerto Rico Rev. Stat. 1945, § 293.19.

[16] Olender v. United States, 210 F. (2d) 795 (1954); Falsome v. United States, 205 F. (2d) 734 (1953); Gariepy v. United States, 189 F. (2d) 459 (1951); United States v. Hiss, 185 F. (2d) 822 (1950); Hemmelfarb v. United States, 175 F. (2d) 924 (1949), cert. den. 338 U. S. 860, 94 L. Ed. 527 (1950); In re Fisher, 51 F. (2d) 424 (1931); Doll v. Equitable Life Assur Soc., 138 F. 705 (1905); United States v. Stoehr, 100 F. Supp. 143 (1951), affirmed in 196 F. (2d) 276 (1952).

[17] The fact that an inquiry is addressed to a witness by way of deposition procedure rather than in the course of a trial is not significant in this respect since a deposition, while unknown at common law, is a well-recognized modern method for eliciting testimony: People v. Turner, 265 Ill. 594, 107 N. E. 162, Ann. Cas. 1916A 1062 (1914).

Rules of Civil Procedure, federal courts were governed by evidentiary doctrines set forth in federal statutes but, in default thereof, were left to apply those doctrines utilized in the courts of the state wherein the particular federal court was sitting.[18] Except as the supremacy clause of the federal constitution would require otherwise, therefore, even the modern federal courts would feel bound to follow the state rule of evidence, provided the same was not inconsistent with some federal constitutional or statutory provision, as it would be the duty of such a court to see to it that a witness was protected in all of his legal rights.[19]

Accepting, for this purpose, that a federal court should be willing to recognize a state-created testimonial immunity, there would still be a subordinate question as to whether or not such a privilege would be of constitutional character for, if it was not, the witness would have no legal right to remain silent. While a state statute creating a privilege is presumed to be the law of the state until challenged and declared unconstitutional,[20] at least one writer has expressed the belief that the particular Illinois statute here concerned is unconstitutional.[21] There being no Illinois decision on the point up to this moment and the question of constitutionality not being placed in issue in the instant case, the federal court was able to give recognition to the statute. The importance of the case as a precedent is, however, weakened by the presence of this doubt.

Aside from the possible doubt as to the constitutionality of the Illinois version of the accountant's testimonial privilege against disclosure, there is real reason to question the legislative wisdom in enacting the statute. By so doing, the legislature has opened the door to any and every pressure group harboring a belief that, because of the relationship existing between the parties, testimonial disclosure would be likely to injure one of them. If the demand for a full disclosure of the truth in a court of justice is to succumb so easily to the confidential character of a communication, a privilege based upon an obligation of honor may again come to be recognized. If this eventuality should develop, the due administration of justice would be made just so much the more difficult to attain.

R. H. BERGQUIST

18 Nashua Savings Bank v. Anglo-American Land Mortgage & Agency Co., 189 U. S. 221, 23 S. Ct. 517, 47 L. Ed. 782 (1903); Whitford v. Clark County, 119 U. S. 522, 7 S. Ct. 306, 30 L. Ed. 500 (1886); Hunter v. Derby Foods, 110 F. (2d) 970 (1940).

19 First Trust Co. of St. Paul v. Kansas City Life Ins. Co., 79 F. (2d) 48 (1948); Munzer v. Swedish American Line, 35 F. Supp. 493 (1940); Application of Heller, 184 Misc. 75, 53 N. Y. S. (2d) 86 (1945); Ex parte Taylor, 110 Tex. 331, 220 S. W. 74 (1920).

20 Butler v. Fayercoesther, 91 F. 458 (1899); Lloyd v. Pennie, 50 F. 4 (1892); Witters v. Sowles, 32 F. 130 (1887).

21 See note in 37 Chi. Bar Rec. 291 and the response thereto at 369.

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—WHETHER ONE DIVORCED PARENT MAY OBTAIN EQUITABLE ASSISTANCE TO PREVENT THE OTHER PARENT FROM CHANGING THE SURNAME OF THEIR MINOR CHILD—An interesting question, one seldom brought to the courts, has recently been decided by the Supreme Judicial Court of Massachusetts in the case of *Mark* v. *Kahn*[1] and by the Appellate Court for the First District of Illinois in the case of *Solomon* v. *Solomon*.[2] These cases concerned the right of a parent to whom, upon divorce, the custody of a minor child had been assigned to change the surname of that child following a remarriage. In the Massachusetts case, the issue arose in the form of a suit to enjoin the plaintiff's former wife from registering the children involved in school under the surname of her second husband and from otherwise representing the children by that name. The trial court granted the requested injunction, feeling that the substitution of names was essentially induced by the defendant's antagonism toward the plaintiff and not out of consideration for the welfare of the children, but the higher court reversed and remanded for a further hearing when it conceived that, while the father was a proper party to bring the action, the court should have accented the well-being of the children as the vital consideration. The Illinois case grew out of a petition filed in a divorce case, after a decree therein, seeking to restrain the petitioner's former wife from maintaining a separate change of name proceeding instituted by her as mother and custodian of the child. In affirming the grant of a restraining order on such petition, the reviewing court held that jurisdiction could be exercised in such a case as the power was said to be incidental to those powers granted by the Divorce Act,[3] even though the petitioner could also have filed his objection in the separate change of name proceeding.

The jurisdiction of courts of equity in the United States in matters involving children is a heritage from that jurisdiction traditionally exercised by the English Court of Chancery over the persons of infants and over their property.[4] According to common conception, this jurisdiction represents the assumption by the Chancellor of the Crown's role as *parens patriae*[5] and, as exercised, it is plenary, extending to the protection of all

1 — Mass. —, 131 N. E. (2d) 758 (1956).

2 5 Ill. App. (2d) 297, 125 N. E. (2d) 675 (1955). An earlier aspect of this case may be noted in 319 Ill. App. 618, 49 N. E. (2d) 807 (1943).

3 Ill. Rev. Stat. 1955, Vol. 1, Ch. 40, § 1 et seq., particularly § 19.

4 An annotation in 14 A. L. R. 308 contains an excellent list of citations. See also 43 C. J. S., Infants, § 5, particularly notes 37, 49, and 50; 14 R. C. L., Infants, §§ 42-4, pp. 267-71; and 10 R. C. L., Equity, § 89, p. 340.

5 Pomeroy, Equity Jurisprudence (The Lawyer's Co-operative Publishing Co., Rochester, N. Y., 1941), 5th Ed., Vol. 4, § 1304, p. 870.

rights, real or personal.[6] Although, therefore, in the Solomon case, the court found a basis for jurisdiction in the powers granted under the divorce statute, it probably could have acted in the matter even without benefit thereof, for equitable jurisdiction in relation to the care, custody, and welfare of infants, at least with reference to those courts possessing general equity powers, is of an inherent nature and exists independently of statute.[7]

The all-important question to be considered, whenever matters affecting children come before such courts, of course, is one concerning the manner of best serving the welfare of the minor.[8] Whether the minor is or is not a party to a controversy before the court, if the minor's rights and well-being may be affected by the adjudication, equity not only may but should act to protect the minor's interests, even though this would require the making of an inquiry on the court's own motion in order to ascertain all facts necessary to effect that end.[9] This is exactly what

[6] Illustrations of the exercise of this power may be found in New York Life Ins. Co. v. Bangs, 103 U. S. (13 Otto) 780, 26 L. Ed. 580 (1880); Blackburn v. Moore, 206 Ala. 335, 89 So. 745 (1921); Turner v. Andrews, 143 Fla. 88, 196 So. 449 (1940); Richards v. East Tenn., V. & G. Ry. Co., 106 Ga. 614, 33 S. E. 193 (1899); Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892 (1913); Thomas v. Thomas, 250 Ill. 354, 95 N. E. 345 (1911); Ames v. Ames, 148 Ill. 321, 36 N. E. 110 (1894); Van Matre v. Sanky, 148 Ill. 536, 36 N. E. 628 (1893); In re Ferrier, 103 Ill. 367, 43 Am. Rep. 10 (1882); Dodge v. Cole, 97 Ill. 338, 37 Am. Rep. 111 (1881); Hartmann v. Hartmann, 59 Ill. 103 (1871); Grattan v. Grattan, 18 Ill. 167 (1856); Cowls v. Cowls, 8 Ill. 435 (1846); McCord v. Ochiltree, 8 Ind. (Blackf.) 15 (1846); Lally v. Fitz Henry, 85 Iowa 49, 51 N. W. 1155 (1892); Watson v. Watson, 183 Ky. 516, 209 S. W. 524 (1919); In re Badger, 286 Mo. 139, 226 S. W. 936 (1920); Latta v. Trustees of Gen. Assembly of Presbyterian Church, 213 N. C. 462, 196 S. E. 862 (1938); Petition of Travers, 177 Misc. 1044, 32 N. Y. S. (2d) 742 (1941); State v. Gronna, 79 N. D. 673, 59 N. W. (2d) 514 (1953); In re Stittgen, 110 Wis. 625, 86 N. W. 563 (1901).

[7] Emrich v. McNeil, 75 U. S. App. D. C. 307, 126 F. (2d) 841 (1942); Clinkscales v. Clinkscales, 210 Ala. 358, 97 So. 922 (1923); Foy v. Foy, 25 Cal. App. (2d) 543, 73 P. (2d) 618 (1937); People ex rel. Glendening v. Glendening, 259 App. Div. 384, 19 N. Y. S. (2d) 693 (1940); Bartlett v. Bartlett, 175 Ore. 215, 152 P. (2d) 402 (1944); Urbach v. Urbach, 52 Wyo. 207, 73 P. (2d) 953 (1937).

[8] Don v. Don, 142 Conn. 309, 114 A. (2d) 203 (1955); Ames v. Ames, 148 Ill. 321, 36 N. E. 110 (1894); King v. King, 15 Ill. 188 (1853); In re Bort, 25 Kan. 215 (1881); Longnecker v. Greenwade, 35 Ky. (5 Diana) 516 (1837); Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624 (1925); Kay v. Kay, 95 Ohio App. 520, 112 N. E. (2d) 562 (1953). See also annotation in 40 A. L. R. 940.

[9] Fletcher v. First National Bank of Opelika, 244 Ala. 98, 11 So. (2d) 854 (1943); Pereira v. Toscano, 84 Cal. App. 526, 258 P. 429 (1927); Clarke v. Chicago Title & Trust Co., 393 Ill. 419, 66 N. E. (2d) 378 (1946); McReynolds v. Miller, 372 Ill. 51, 22 N. E. (2d) 951 (1939); Mathews v. Doner, 292 Ill. 592, 127 N. E. 137 (1920); Mechling v. Mayers, 284 Ill. 484, 129 N. E. 542 (1918); Mason v. Truett, 257 Ill. 18, 100 N. E. 202 (1912); Johnson v. Turner, 319 Ill. App. 265, 49 N. E. (2d) 297 (1943); Schorow v. Schorow, 299 Ill. App. 618, 20 N. E. (2d) 143 (1939); Chudleigh v. Chicago, R. I. & P. Ry. Co., 51 Ill. App. 491 (1893); Cavender v. Smith's Heirs, 5 Iowa 192 (1857); Kidd v. Kidd, 276 Ky. 271, 124 S. W. (2d) 66 (1939); Carson v. Hecke, 282 Mo. 580, 222 S. W. 850 (1920); Jones v. Hudson, 93 Neb. 561,

the court did do in the Massachusetts case under consideration for it remanded the matter for further hearing to assure that the welfare of the minors there concerned would be given the fullest consideration.[10]

The same basic question also becomes exclusively significant in any proceeding designed to produce a change in the name of a child, and this whether the proceeding arises upon an application by the child's guardian or next friend,[11] or upon prayer by one parent to restrain the other from attempting to effectuate a change.[12] It is true that, at common law, an adult individual had a right to change his name at will, merely by the process of adopting another name without resort to any form of legal proceeding,[13] and statutes providing methods for regularizing the change of a name are regarded as being in affirmance and in aid of the common law rather than in abrogation of it.[14] Nevertheless, a court hearing a petition for a change of name on the part of an adult is generally vested with a degree of discretion over the granting of the application,[15] regard being had to the purpose for and the possible wrongs likely to be produced by such change, so there is evident reason why it or any other court should have power to act in much the same way where a minor is concerned. In

141 N. W. 141 (1913); In re Vieweger, 93 N. J. Eq. 291, 117 A. 291 (1922); Haden v. Eaves, 55 N. M. 40, 226 P. (2d) 457 (1951); Lefavre v. Laraway, 16 Barb. 167 (N. Y., 1856); Bennett v. Fleming, 105 Ohio St. 352, 137 N. E. 900 (1922); Harjo v. Johnston, 187 Okla. 561, 104 P. (2d) 985 (1940); Wilson v. Mullen, 11 Tenn. App. 319 (1930).

10 See, in that regard, 27 Am. Jur., Infants, § 101, p. 823.

11 Don v. Don, 142 Conn. 309, 114 A. (2d) 203 (1932); Binford v. Reid, 83 Ga. App. 280 (1951); In re Taminosian, 97 Neb. 514, 150 N. W. 824 (1915); Application of Sloan, 203 Misc. 1035, 118 N. Y. S. (2d) 594 (1953); Application of Weiss, 200 Misc. 241, 106 N. Y. S. (2d) 795 (1951); Application of Proman, 63 N. Y. S. (2d) 83 (1946); Application of Wittlen, 61 N. Y. S. (2d) 726 (1946); Application of Horn, 21 N. Y. S. (2d) 453 (1940); In re Cohen, 142 Misc. 852, 255 N. Y. S. 616 (1932); In re Epstein, 121 Misc. 151, 200 N. Y. S. 397 (1923).

12 Bruguier v. Bruguier, 12 N. J. Supp. 350, 79 A. (2d) 497 (1951); Galanter v. Galanter, 133 N. Y. S. (2d) 266 (1954); Nitzberg v. Board of Education of City of New York, 104 N. Y. S. (2d) 421 (1951); Schoenberg v. Schoenberg, 57 N. Y. S. (2d) 283 (1945), modified in 269 App. Div. 1048, 59 N. Y. S. (2d) 280 (1945); In re Cohn, 181 Misc. 1021, 50 N. Y. S. (2d) 278 (1943); Kay v. Kay, 95 Ohio App. 520, 112 N. E. (2d) 562 (1953).

13 In re Ross, 8 Cal. (2d) 608, 67 P. (2d) 94 (1937); Reinken v. Reinken, 351 Ill. 409, 184 N. E. 639 (1933); Loser v. Plainfield Savings Bank, 149 Iowa 672, 128 N. W. 1101 (1910); Smith v. U. S. Casualty Co., 197 N. Y. 420, 90 N. E. 947 (1910); State v. Hashmall, 160 Ohio St. 565, 117 N. E. (2d) 606 (1954); Kay v. Kay, 95 Ohio App. 520, 112 N. E. (2d) 562 (1953); State v. Ford, 89 Ore. 121, 172 P. 802 (1918).

14 Smith v. U. S. Casualty Co., 197 N. Y. 420, 90 N. E. 947 (1910); Haynes v. Brennan, 135 N. Y. S. (2d) 900 (1954); Laflin & R. Powder Co. v. Steytler, 146 Pa. 434, 23 A. 215 (1892).

15 In re Ross, 8 Cal. (2d) 608, 67 P. (2d) 92 (1937); Re La Societe Francaise D'Epargnes et de Preboyance Mutuelle, 123 Cal. 525, 56 P. 485 (1899); Reinken v. Reinken, 351 Ill. 409, 184 N. E. 639 (1933); In re Taminosian, 97 Neb. 514, 150 N. W. 824 (1915). See also 38 Am. Jur., Names, § 29, p. 10.

view of the common law rule, however, courts have been encouraged to grant these petitions, denying them only for some substantial reason.[16]

Turning specifically to decisions relating to changes in the names of minors, it may be said that the tradition of the untrammelled common law right probably led a New Jersey court to deny a father's motion in a divorce action to have his child cease using a name other than the one given at birth for the court said that the ordinary rules of minority would not limit the right of a person to change his name at will without resort to a legal proceeding.[17] A New York court also once said that, as it was no more than custom which gave a person the family name of his or her father, the general rule was one from which he might "depart if he chooses."[18] In spite of these assertions, however, it is entirely possible that the judges responded as they did merely because they could see no reason, despite the "welfare" principle which hangs compellingly on the conscience of the court,[19] to resist the change, for they have applied the welfare concept in still other cases.[20]

As the relationship between parent and child possesses a degree of sanctity, equity has been prone to encourage the continued acknowledgment by the child of his original parentage, even though the marital bond between the parents has been judicially severed,[21] particularly since actual paternity can never be changed and, by so identifying themselves, children may gain in emotional maturity.[22] There is at least one instance in which this interest in the child has been treated as if it represented a right in the father to the perpetuation of his name.[23] In the New York case of

16 Clinton v. Morrow, 220 Ark. 377, 247 S. W. (2d) 1015 (1952); In re Useldinger, 35 Cal. App. (2d) 723, 96 P. (2d) 958 (1939); In re Ross, 8 Cal. (2d) 608, 67 P. (2d) 94 (1937); Don v. Don, 142 Conn. 309, 114 A. (2d) 203 (1955); Petition of Buyarsky, 322 Mass. 335, 77 N. E. (2d) 216 (1948); In re Kastenbaum, 44 N. Y. S. (2d) 2 (1943); Application of Lipshultz, 178 Misc. 113, 32 N. Y. S. (2d) 264 (1941); In re Slobody, 173 N. Y. S. 514 (1918).

17 See Bruguier v. Bruguier, 12 N. J. Supp. 350, 79 A. (2d) 497 (1951).

18 In re Cohen, 142 Misc. 852, 255 N. Y. S. 616 at 617 (1932).

19 In the case of Don v. Don, 142 Conn. 309 at 312, 114 A. (2d) 203 at 205, the court said: "When the question presented is whether the name of a minor child should be changed, the court, in line with its universal duty to protect the interests of minors, must take into consideration whether the change of name will promote the child's best welfare."

20 Application of Simon, 1 Misc. (2d) 177, 148 N. Y. S. (2d) 114 (1955); Application of Sloan, 203 Misc. 1035, 118 N. Y. S. (2d) 594 (1953); Application of Proman, 63 N. Y. S. (2d) 83 (1946); Application of Wittlen, 61 N. Y. S. (2d) 726 (1946).

21 Clinton v. Morrow, 220 Ark. 377, 247 S. W. (2d) 1015 (1952); Nitzberg v. Board of Education of City of New York, 200 Misc. 748, 104 N. Y. S. (2d) 421 (1951); In re Epstein, 121 Misc. 151, 200 N. Y. S. 897 (1923); Kay v. Kay, 95 Ohio App. 520, 112 N. E. (2d) 562 (1953).

22 See Application of Simon, 1 Misc. (2d) 177, 148 N. Y. S. (2d) 14 (1955).

23 Galanter v. Galanter, 133 N. Y. S. (2d) 266 (1954).

Schoenberg v. *Schoenberg*,[24] the court also stated that the "apparent generosity of the plaintiff's present husband toward the children and the possible embarrassment to the children do not overcome the primary right of the defendant to have his children bear his name."[25] But if this can be said to be a right at all, rather than the evidence of a normal desire, it is, as judged from a review of the authorities, not an absolute one. It would, nevertheless, appear to be of sufficient importance to sustain an effort by the father to at least reach the ear of an equity court in a matter allegedly based upon the welfare of an infant, for it could be said to illustrate a father's natural concern in that welfare.[26]

Inasmuch as courts are not prone to allow an infant to change its name, or to permit its mother to do so over the objection of the father, unless some reason exists to make the change, equity ordinarily will require that the father's name be retained until the child reaches maturity and is capable of intelligently determining for himself whether he wishes to continue to use the surname of his birth or to take another.[27] If, however, some compelling reason exists, the application for change of name will be granted or the father's petition to prevent the change will be denied.[28] The fact that the mother has been granted custody over the child does not give her any special right in this regard, for at least one court has said that the matter of selecting a name is not an incident to any general guardianship.[29] The possible inconvenience to the mother in having to explain the difference in names, or her possible embarrassment in having to disclose that the child is of another marriage and that she has been divorced, has also been said to be inadequate reason to thwart the child's heritage or to cut further into the relationship between the father and the child.[30]

A father who has contributed to the support of his child, who has shown an interest in the minor's character development, who has secured the child's affection, and who has evidenced a sincere desire to further and

[24] 57 N. Y. S. (2d) 283 (1945), modified in 269 App. Div. 1048, 59 N. Y. S. (2d) 283 (1945).

[25] 57 N. Y. S. (2d) 283 at 284.

[26] Application of Harris, 43 N. Y. S. (2d) 521 (1943).

[27] Kay v. Kay, 95 Ohio App. 520, 112 N. E. (2d) 562 (1953); Nitzberg v. Board of Education of City of New York, 200 Misc. 748, 104 N. Y. S. (2d) 421 (1951); In re Cohen, 181 Misc. 1021, 50 N. Y. S. (2d) 278 (1943); In re Epstein, 121 Misc. 151, 200 N. Y. S. 897 (1923).

[28] See, in that regard, the cases of In re Cohen, 181 Misc. 1021, 50 N. Y. S. (2d) 278 (1943), and Application of Biegaj, 25 N. Y. S. (2d) 85 (1941).

[29] In the New York case of In re Cohen, 181 Misc. 1021, 50 N. Y. S. (2d) 278 at 279 (1943), the court said that a contention of this nature was "wholly unsound."

[30] Application of Simon, 1 Misc. (2d) 177, 148 N. Y. S. (2d) 14 (1955); Galanter v. Galanter, 133 N. Y. S. (2d) 266 (1954); Application of Wittlen, 61 N. Y. S. (2d) 726 (1946).

maintain the child's physical and emotional security, is likely to find a judicial tendency to look with favor upon his petition.[31] Where, however, a father has been responsible for the divorce, has neglected his child, or has failed to make prompt objection to the change of name, the courts will certainly be unsympathetic toward his desire to perpetuate his name,[32] either because he will be deemed to have waived his rights or because, in such instances, the courts will be apt to say that there is no parent-child relationship to preserve.[33] Conversely, a court looking at the situation from the standpoint of the infant and noting the fact that he had not known his father; that the continued use of the father's name would cause him shame or embarrassment; that he would be confused and inconvenienced by a difference in names between himself and his mother; or would be disturbed by the resumption of his father's name after he had been known at school and to his friends by another name, would be prone to permit the infant to adopt or retain a surname other than the one given at birth and would deny the father's petition for injunction.[34]

While neither parent has a right to change a child's surname unilaterally, an equity court, in the exercise of its inherent jurisdiction, will, upon objection of one of the parents, determine whether to permit such a change or to enjoin it. Each case of this type stands, as it should, on its own peculiar facts and circumstances with the resolution thereof depending upon those factors which will best promote the welfare of the infant.

S. J. ALBERT

JOINT TENANCY—SURVIVORSHIP—WHETHER SURVIVING TENANT WHO HAS FELONIOUSLY CAUSED DEATH OF HIS JOINT TENANT RETAINS RIGHT OF SURVIVORSHIP IN JOINTLY OWNED PROPERTY—The situation posed in the recent case of *Bradley* v. *Fox*[1] not only provided the Supreme Court of Illinois with another opportunity to determine the rights enjoyed by a surviving joint tenant who had murdered his co-tenant but also gave it an excellent chance to depict one of the fundamental weaknesses which can lie in too great a reliance on the doctrine of *stare decisis*. According to the facts of that case, a husband and wife, subsequent to their marriage, had pooled their individual funds and had taken title to a parcel of real property as joint tenants. The husband thereafter took the life

31 Kay v. Kay, 95 Ohio App. 520, 112 N. E. (2d) 562 (1953).

32 See cases cited in note 20, ante, and the case entitled Application of Horn, 21 N. Y. S. (2d) 453 (1940).

33 Don v. Don, 142 Conn. 309, 114 A. (2d) 203 (1955).

34 Binford v. Reid, 83 Ga. App. 280, 63 S. E. (2d) 354 (1951).

1 7 Ill. (2d) 106, 129 N. E. (2d) 699 (1955).

of his wife[2] and, following this, conveyed the property to the attorney who defended him as security for the payment of attorney's fees, the attorney taking with full knowledge of the facts and circumstances. The plaintiffs in the action, a daughter of the decedent by a former marriage and the administrator of the decedent's estate, then commenced suit, one count being directed toward the recovery of damages for the wrongful death[3] and the other seeking to establish a constructive trust in the property formerly held in joint tenancy. A motion to dismiss the entire complaint for failure to state a cause of action having been sustained in the trial court, the case was taken on direct appeal to the Supreme Court.[4] The plaintiffs there contended that, inasmuch as the principal defendant had acquired the sole legal title to the property by his felonious act, it was unconscionable to permit him, or his successor in interest, to retain the entire beneficial interest in the property and, as a consequence, equity should impose a constructive trust thereon for the benefit of the plaintiffs. The Supreme Court, reversing the trial court decision and remanding the cause with directions, concluded that as the husband, by his felonious act, had destroyed the right of survivorship, it was lawful to permit him to retain no more than the title to an undivided one-half interest in the property in dispute as a tenant in common.

The problem of determining the extent of the rights enjoyed by a surviving joint tenant who had murdered his co-tenant had, prior to the instant case, arisen only once before in Illinois. In the case of *Welsh* v. *James*,[5] decided in 1951, the victim's heir sought the same relief as was applied for in the instant case but the Supreme Court, sustaining a defense motion to dismiss, there concluded that the wrong-doing survivor could not, constitutionally, be deprived of his right of survivorship. The court there based its decision on the proposition that, as the survivor took the whole interest by virtue of the original contract or conveyance and gained nothing by the death, a forfeiture would necessarily result if a court decision were to take any part of the property from him.[6] By deciding

[2] For this offense, the husband was subsequently convicted of murder and sentenced to the penitentiary.

[3] The claim for damages for wrongful death was dismissed in the trial court but, on appeal, the defendant's contention that, as a surviving spouse-beneficiary, his contributory fault operated to bar the other beneficiaries from recovering under the Wrongful Death Act was rejected. This point is dealt with more elaborately in a note to the case of Nudd v. Matsoukas, 7 Ill. (2d) 608, 131 N. E. (2d) 525 (1956), which appears elsewhere in this issue.

[4] Direct appeal was proper as a freehold was involved: Ill. Rev. Stat. 1955, Vol. 2, Ch. 110, § 75.

[5] 408 Ill. 18, 95 N. E. (2d) 872 (1951), noted in 29 CHICAGO-KENT LAW REVIEW 260.

[6] Forfeiture of property as a penalty for commission of crime is prohibited by Ill. Const. 1870, Art. II, § 11.

in this manner, the court then fell into line with a series of other outside cases similar in their facts but where the property was either held under a tenancy by entirety[7] or partook of the nature of a joint and survivorship bank account.[8] While it is true that, in these cases, the courts concerned had indicated that the slayer, holding a present vested interest in the whole property before the murder, was not to be deprived thereof merely because he had violated public policy in some other respect,[9] at least one of the opinions expressed a sense of dissatisfaction together with an uneasy feeling that the court, in reality, was enforcing a right of survivorship.[10]

In direct opposition to this view, certain of the inferior New York courts have seen fit to deprive the wrongdoer completely of any share whatever in the jointly owned property.[11] They have looked, for substantiation of their position, to the common law rule that a man may not be allowed to profit by his own wrong[12] as well as to the doctrine of the civil law which deprived one who had procured the death of another from succeeding to the estate on the ground that he was unworthy of inheritance.[13] It should be noted, however, that in none of the New York cases was the question of forfeiture raised, although there is a statute in that

[7] See National City Bank of Evansville v. Bledsoe, — Ind. App. —, 133 N. E. (2d) 877 (1956), wherein Kendall, J., wrote a dissenting opinion concurred in by Bowen, J., and the cases of Wenker v. Landon, 161 Ore. 265, 88 P. (2d) 971 (1939), and Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S. W. 108 (1907). For a case dealing with a joint tenancy problem, see Smith v. Greenburg, 121 Colo. 417, 218 P. (2d) 514 (1950).

[8] Oleff v. Hodapp, 129 Ohio St. 432, 195 N. E. 839 (1935); Schuman v. Schick, 95 Ohio App. 413, 120 N. E. (2d) 330 (1953).

[9] For a full discussion of this view, especially as it pertains to a tenancy by entirety, see the dissenting opinion of Dethmers, J., concurred in by Sharpe, Boyles and Reid, JJ., in the case of Budwitt v. Herr, 339 Mich. 265, 63 N. W. (2d) 841 (1954). In an even more recent case that of Goldsmith v. Pearce, — Mich. —, 75 N. W. (2d) 810 (1956), Dethmers, then Ch. J., again dissented, with concurrence on the part of Sharpe and Boyles, JJ., for the reasons stated in his dissenting opinion in the earlier case. Reid, J., however, this time wrote the majority opinion.

[10] In Oleff v. Hodapp, for example, the court said: "We are not subscribing to righteousness of Tego's legal status; but this is a court of law and not a theological institution. We have no powers to attaint Tego in any way, shape or form. Property cannot be taken from an individual who is legally entitled to it because he violated a public policy. Property rights are too sacred to be subjected to a danger of that character. We experience no satisfaction in holding that Tego is entitled to this account, but that is the law, and we must so find." See 129 Ohio St. 432 at 438, 195 N. E. 838 at 841.

[11] Bierbrauer v. Moran, 244 App. Div. 87, 279 N. Y. S. 176 (1935); In re Santourian's Estate, 125 Misc. 668, 212 N. Y. S. 116 (1925); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. S. 173 (1918).

[12] See People v. Schmidt, 216 N. Y. 324 at 341, 110 N. E. 945 at 950 (1915), where the court said: "The principle is fundamental that no man shall be permitted to profit by his own wrong. It enters by implication into all contracts, and all laws."

[13] Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. S. 173 (1918). See, in that regard, Ill. Rev. Stat. 1955, Vol. 1, Ch. 3, § 167.

state directed against the forfeiture of an estate by reason of a conviction for crime.[14]

While the New York cases appear to stand alone in the solution they have achieved with respect to this problem,[15] they are not the only ones which rely upon the timeless maxim *nullus commodum capere potest de injuria sua propria.*[16] In fact, it would appear to be the trend of modern authority to allow the killer to retain the legal title to the whole property but, in these instances, to permit equity to impose a constructive trust, of varying proportions, for the benefit of the victim's heirs.[17] In reviewing these decisions, however, one is confronted with a startling lack of uniformity among the jurisdictions as to just how much of the property should be so held in trust. Delaware has gone so far as to impose a constructive trust over the entire estate legally held by the survivor, giving him no more than the commuted value of the net income of one-half of the property for the number of years of his life expectancy.[18] New Jersey, dealing with the constructive trust doctrine in two instances, first gave the victim's heirs no more than the value of the victim's interest in the net income of the property for her normal life expectancy[19] but, in a later case, erected a trust over the entire property, subject to a lien for the commuted value, at the time of the victim's death, of the net income of one-half of the property for the number of years of his life expectancy as determined according to the mortality tables used in the court.[20] In Minnesota and North Carolina, the courts have developed a less complex solution,[21] with the legal title passing to the slayer to be held by him as a

[14] McKinney, Cons. Laws N. Y., Vol. 39, Penal Law, § 512.

[15] The rule in Wisconsin might be said to be in accord, but could be open to differentiation. In a case of first impression, that of In re King's Estate, 261 Wis. 266, 52 N. W. (2d) 855 (1952), wherein Currie, J., wrote a dissenting opinion joined in by Fritz, C. J., and Broadfoot, J., the majority held that no estate, in trust or otherwise, passed to the slayer upon the death of the slain person. According to the facts of that case, the slayer had murdered his joint tenant and, immediately thereafter, committed suicide. The court, reasoning that the slayer could not deprive his co-tenant of her rights by murdering her, indicated that her right of survivorship continued in her administrator and heirs at law after her death so that, when the slayer died, her right of survivorship became operative and vested the entire estate in her heirs.

[16] 2 Co. Litt. 148(b). The maxim may be translated to mean: "No man can take advantage of his own wrong."

[17] See the dissenting opinion by Williams, J., in Oleff v. Hodapp, 129 Ohio St. 432, 195 N. E. 838 (1935).

[18] Colton v. Wade, 32 Del. Ch. 122, 80 A. (2d) 923 (1951).

[19] Sherman v. Weber, 113 N. J. Eq. 451, 167 A. 517 (1933). It should be noted that the wrongdoer in the case was younger than his victim. For this reason, the court expressed belief that he would, in all probability, have outlived her in the normal course of events, hence would have, in time, succeeded to the entire estate.

[20] Niemann v. Hurff, 14 N. J. Super. 479, 82 A. (2d) 471 (1951).

[21] Illustrations of this view may be found in Vesey v. Vesey, 237 Minn. 295, 54 N. W. (2d) 385 (1952), and in Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927).

constructive trustee to the extent of the share held by the victim prior to death for the benefit of the victim's heirs, to whom the entire estate would pass upon the death of the constructive trustee.[22] While these applications of the constructive trust doctrine may be said to produce an equitable and just solution to the problem, it cannot be denied that the principle comes perilously close to working a forfeiture.

To avoid this predicament, some courts have devised another way by which the wrongdoer may be precluded from benefiting from his wrongful act.[23] Under it, the wrongful act is deemed to have operated so as to terminate the joint tenancy, thus allowing the property to go as if held by tenants in common. The slayer is thereby allowed to retain ownership in an undivided proportionate part but gains no title to, or right of enjoyment in, the remainder, which remaining portion is immediately vested in the heirs at law or next kin of the murdered co-tenant. As this grant to the slayer of an undivided interest in the property as tenant in common gives him everything to which he could normally be said to be entitled had a partition occurred, this disposition of the matter in no way results in depriving him of any property right guaranteed by any provision of a state or the federal constitution.

The instant case, representing a clear-cut reversal in the rule heretofore established in this state, represents a comprehensive illustration of the application of this "tenancy in common" solution.[24] First, the court did away with that legal fiction incident to the concept of joint tenancy whereby each tenant has been deemed to hold the entire estate, as if from the outset, by virtue of the original contract or conveyance.[25] It then held that an implied condition in every joint tenancy contract was breached at the moment the murderer killed his co-tenant.[26] This, in turn,

22 This is the view advocated by such text writers as Ames, Lectures on Legal History, pp. 310-22; Bogert, Trusts and Trustees, Vol. 3, § 478; Scott, Trusts, § 493.2; and advanced in Restatement, Restitution, §§ 187-8.

23 In addition to the holding in the instant case, see Hogan v. Martin, — Fla. —, 52 So. (2d) 806 (1951); Ashwood v. Patterson, — Fla. —, 49 So. (2d) 848 (1951); Cowan v. Plesant, — Ky. App. —, 263 S. W. (2d) 494 (1953); Goldsmith v. Pearce, — Mich. —, 75 N. W. (2d) 810 (1956); Budwitt v. Herr, 339 Mich. 265, 63 N. W. (2d) 841 (1954); Grose v. Holland, 357 Mo. 874, 211 S. W. (2d) 464 (1948); and Barnett v. Couey, 224 Mo. App. 913, 27 S. W. (2d) 757 (1930). See also the dissenting opinion by Currie, J., in In re King's Estate, 261 Wis. 266, 52 N. W. (2d) 855 (1952).

24 While the case was ultimately decided upon the "tenancy in common" theory, the court did discuss, with apparent approval, the constructive trust theory mentioned herein.

25 Where equitable principles intervene this legal fiction must, of course, be ignored. It has, however, been utilized in tax problems and some revision may have to be made in the thinking in that area as a consequence of the decision.

26 In that connection, the court said: "In joint tenancy the contract that the survivor will take the whole necessarily presupposes that the death of either will

led to a destruction of one of the four coexisting unities necessary in a joint tenancy, thus causing a severance of the joint estate and an accompanying extinguishment of the right of survivorship.[27] The joint tenancy being so dissolved, the tenants held as tenants in common with the consequence that the slayer never realized any additional interest in the property which could be made the subject of a forfeiture.

A fifth solution to the problem, offered as a suggestion in the opinions of certain of the American courts,[28] would require action on the part of the legislature. Pennsylvania appears to have responded to this suggestion by the enactment of its so-called "slayer" statute,[29] which might, with some modification, serve as a model for this state and could serve to put the question entirely beyond the realm of judicial speculation over the binding effect of *stare decisis*.[30] Such a statute could be made to cover not only the joint tenancy situations, such as the one found in the instant case, but could provide for testate and intestate situations as well.[31] In the joint tenancy situation, the Pennsylvania version of the statute provides that the victim's estate is entitled at once to a one-half or other proportionate interest in the jointly owned property and is to gain the other one-half or proportionate share upon the death of the slayer unless the latter obtains a separation or severance of the property or a decree granting partition.

In the absence of such a statute, those American courts which have been faced with this and kindred problems have had the burden of selecting from among the aforementioned four theories. Of the four, the constructive trust and the tenancy in common theories appear to be the most satisfactory ways of achieving the end that no man should be permitted

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be in the natural course of events and that it will not be generated by either tenant murdering the other. One of the implied conditions of the contract is that neither party will acquire the interest of the other by murder." 7 Ill. (2d) 106 at 118, 129 N. E. (2d) 699 at 705.

[27] Klouda v. Pechousek, 414 Ill. 75, 110 N. E. (2d) 258 (1953).

[28] See, in particular, the opinions in Vesey v. Vesey, 237 Minn. 295, 54 N. W. (2d) 385 (1952); Sherman v. Weber, 113 N. J. Eq. 451, 167 A. 517 (1933); and Wenker v. Landon, 161 Ore. 265, 88 P. (2d) 971 (1939).

[29] Purdon Pa. Stat. Ann., Cum. Supp. 1950, Tit. 20, Ch. 10, § 3441 et seq.

[30] To offset the defense contention that the instant case was controlled by the holding in Welsh v. James, 408 Ill. 18, 95 N. E. (2d) 872 (1951), the court said it had "the power and duty under the doctrine of stare decisis to re-examine the authorities and legal concepts invoked in that opinion . . . for the doctrine . . . is a salutary but not an inflexible rule furthering the practical administration of justice." 7 Ill. (2d) 106 at 111, 129 N. E. (2d) 699 at 702. See also the address by Klingbiel, J., of the Illinois Supreme Court, reported in 44 Ill. B. J. 210-3 (1955).

[31] For a complete discussion of the statutory solution and the construction of a model statute, see Wade, "Acquisition of Property by Wilfully Killing Another—A Statutory Solution," 49 Harv. L. Rev. 715 (1936). See also note in 29 CHICAGO-KENT LAW REVIEW 260 at 262.

to profit by his own misdeeds. The court in the instant case, contrary to the views it expressed less than four years ago, approved the constructive trust theory but it applied the equally equitable tenancy in common theory to reduce the possibility of future attack on the ground that it had thereby worked an unconstitutional forfeiture of property rights. It is to be hoped that the Illinois law in this respect may now be said to be settled.

G. L. BERMAN

MALICIOUS PROSECUTION—ACTIONS—WHETHER FILING OF GRIEVANCE COMPLAINT AGAINST ATTORNEY IS PRIVILEGED OR WILL SUPPORT ACTION FOR MALICIOUS PROSECUTION—A question of interest to members of the legal profession was raised in the recent New Jersey case of *Toft* v. *Ketchum*,[1] wherein an attorney, after an unsuccessful attempt by the defendant to have the plaintiff disbarred or otherwise penalized for alleged improper conduct,[2] sued to recover damages for an alleged malicious prosecution. A motion by defendant to dismiss the complaint for failure to state a cause of action was granted by the trial court. While the plaintiff's appeal was pending before the Appellate Division of the Superior Court, the New Jersey Supreme Court certified the appeal on its own motion and affirmed the trial court when it reached the conclusion that public policy dictated that grievance complaints against attorneys were to be considered as privileged in nature, hence the filing thereof could not be considered as forming the basis for a subsequent action in the nature of a suit for malicious prosecution. Upon a rehearing, the court reaffirmed its decision on the same grounds.[3] The plaintiff then petitioned the United States Supreme Court for a writ of certiorari and the New Jersey State Bar Association presented a motion for leave to file a brief as *amicus curiae* in support of the plaintiff's petition. The motion was granted but the writ of certiorari was denied,[4] so it would now appear that a lawyer against whom a disbarment proceeding has been maliciously instigated is afforded scant, if any, protection under the law.

[1] 18 N. J. 280, 113 A. (2d) 671 (1955). Jacobs, J., wrote a concurring opinion. Wachenfeld and Burling, JJ., each wrote a dissenting opinion.

[2] The prior proceedings had, apparently, been dismissed because the alleged unethical conduct took place in relation to the lawyer's business as a licensed real estate broker and was not directly related to his practice of law. Subsequent thereto, the court held, in In re Carlsen, 17 N. J. 338, 111 A. (2d) 393 (1955), and in In re Genser, 15 N. J. 600, 105 A. (2d) 829 (1954), that jurisdiction did exist to support investigations as to alleged unethical conduct on the part of lawyers even when the conduct grew out of non-legal matters. See, on that point, In re Serritella, 5 Ill. (2d) 392, 125 N. E. (2d) 531 (1955).

[3] 18 N. J. 611, 114 A. (2d) 863 (1955). The court remained aligned as it stood at the time of the original opinion.

[4] 350 U. S. 887, 76 S. Ct. 141, 100 L. Ed. (adv.) 79 (1955).

The Supreme Court of New Jersey, at the time it decided the instant case, was faced with basically the very same dilemma[5] that has perplexed the judicial mind throughout the long history of the tort of malicious prosecution. The establishment of an action of this nature, beset as it is with four rigorous elements of proof,[6] took into account both horns of the dilemma and was, to say the least, a masterful solution to the problem. In due time, this new found remedy for malicious criminal prosecution was extended to maliciously instituted civil proceedings[7] and, in even more recent times, this same remedy was further broadened so as to permit a suit for malicious prosecution founded upon an earlier administrative proceeding of a judicial character, provided all necessary elements were present.[8] The tort of malicious prosecution has not, however, escaped further restrictions. The law has cast a shroud of absolute immunity about malicious instigators and prosecutors when acting in the furtherance of some interest of paramount public importance,[9] and much the same sort of immunity has been extended to various public officers.[10] The cases wherein attorneys have brought suits for malicious prosecution based on complaints filed with grievance committees have not been numerous, yet while the decisions generally have not been in favor of the attorneys, none of the earlier decisions had been predicated on the theory of an absolute privilege.[11] It is true that the present case is not one likely to

5 One suggestion of dilemma is this comment on the action for malicious prosecution, to-wit: "Its progress was gradual, for it had to make its way between two competing principles, —the freedom of action that every man should have in bringing criminals to justice and the necessity for checking lying accusations of innocent people. For some time the Judges oscillated between apprehension of scaring off a just accuser and fear of encouraging a false one." See Winfield, A Text-Book of the Law of Tort (Sweet & Maxwell, Ltd., London, 1937), p. 643.

6 According to Prosser, Handbook of the Law of Torts (West Publishing Co., St. Paul, 1941), p. 862, those elements are: "1. A criminal proceeding instituted or continued by the defendant against the plaintiff. 2. Termination of the proceeding in favor of the accused. 3. Absence of probable cause for the proceeding. 4. 'Malice,' or a primary purpose other than that of bringing an offender to justice."

7 When this extension was first made to cover maliciously instituted civil proceedings, two additional requirements were introduced, to-wit: arrest of person or seizure of property, and actual damage in excess of the costs recoverable in the original action: Muldoon v. Rickey, 103 Pa. St. 110 (1883). In later decisions, however, arrest or seizure of property have been deemed non-essential: Kolka v. Jones, 6 N. D. 461, 71 N. W. 558 (1897), and annotation in 143 A. L. R. 157, together with cases there cited.

8 The first case so holding was that of National Surety Co. v. Page, 58 F. (2d) 145 (1932), rehear. den. 59 F. (2d) 370 (1932). See also Fulton v. Ingalls, 151 N. Y. S. 130 (1914), affirmed in 214 N. Y. 665, 108 N. E. 1094 (1915), and Melvin v. Pence, 130 F. (2d) 423 (1942).

9 Prosser, op. cit., pp. 822-3.

10 See, for example, Cooper v. O'Connor, 99 F. (2d) 135 (1938), cert. den. 305 U. S. 643, 59 S. Ct. 146, 83 L. Ed. 414 (1938).

11 For two such examples, see Lancaster v. McKay, 103 Ky. 616, 45 S. W. 887 (1898), and Werner v. Hearst Publications, 65 Cal. App. (2d) 667, 151 P. (2d) 308 (1944).

arouse sympathy for the attorney involved, but the court made it clear that it was not resting its decision on this circumstance when it posited the far-reaching principle that all complaints filed with grievance committees are to be regarded as absolutely privileged.[12]

As the concurring opinion of Justice Jacobs indicates, the court could have reached the same decision on grounds less startling than that of absolute privilege. The fact that the County Ethics and Grievance Committee had conducted extensive hearings and acted upon the results of its own independent investigations would afford one defense[13] and also suggests the possible presence of two others, to-wit: advice of counsel[14] and the existence of probable cause.[15] In addition, since the committee's preliminary hearings, which might be considered to be judicial in nature,[16] did not terminate in favor of the plaintiff, another formidable defense would also seem to be available to the defendant.[17] The presence of any of these enumerated defenses would strongly suggest that the defendant had registered her complaint with the grievance committee in the proper spirit and without malice, an element which, very obviously, is essential to any malicious prosecution case.[18] It would appear, therefore, that the ordinary person who finds it necessary to bring a complaint of improper or unethical conduct against an attorney would usually be amply protected, hence would be unlikely to need any additional protection in the form of an absolute privilege. Nevertheless, the court, in the instant case, held that public policy dictated that all such complaints should be privileged.

Prior to its holding in the instant case, the New Jersey Supreme Court had said, in the case of *Kamm* v. *Flink*,[19] that the "right to pursue a lawful business is a property right that the law protects against unjustifiable interference. Any act or omission which unjustifiably disturbs or impedes the enjoyment of such a right constitutes its wrongful invasion

12 See, in particular, Cowan, "Torts," in Survey of the Law of New Jersey for 1954-55, 10 Rutgers L. Rev. 1 at p. 130.

13 Werner v. Hearst Publications, 65 Cal. App. (2d) 667, 151 P. (2d) 308 (1944); 38 C. J., Malicious Prosecution, § 25, p. 397.

14 King v. Apple River Power Co., 131 Wis. 575, 111 N. W. 668 (1907); 34 Am. Jur., Malicious Prosecution, § 71, p. 747, and cases cited.

15 Wheeler v. Nesbitt, 65 U. S. (24 How.) 544, 16 L. Ed. 765 (1861); 34 Am. Jur., Malicious Prosecution, § 46, p. 729, and cases cited.

16 They were said to be of this character in the majority opinion written by Vanderbilt, Ch. J.

17 54 C. J. S., Malicious Prosecution, § 54, p. 1019.

18 Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116 (1879); 54 C. J. S., Malicious Prosecution, § 40, p. 1003.

19 113 N. J. L. 582, 175 A. 62 (1934).

and is properly treated as tortious."[20] If this principle can be said to apply for the protection of those members of the community who are engaged in the real estate business,[21] in the business of insurance,[22] and in the business of crime detection,[23] it is difficult, indeed, to understand why those engaged in the legal profession should be placed beyond the penumbra of this salutary principle. As the dissenting judge indicated, an attorney, perhaps more than anyone else, may "suffer serious injury when false and malicious accusations of unprofessional conduct are lodged against him in the form of a complaint before a grievance committee."[24] Certainly, an attorney, simply because he is an attorney, is put to no less expense in defending against such malicious accusations. True it is, as the majority of the court pointed out, that the courts are charged with the duty of maintaining the purity and excellence of the bar and, to that end, it is not desirable to discourage legitimate complaints. But any policy that would confer on a complainant an absolute privilege falsely and maliciously to ruin an attorney's reputation and to destroy his livelihood conspicuously disregards the sage injunction to the judiciary to "hear the other side," produces a measure of judicial unbalance, and leaves the aforementioned dilemma unmastered.

The majority of the New Jersey court attempts, in its decision, to bridge the abyss it has created at the feet of the practicing attorney by suggesting that, since disciplinary proceedings are judicial in nature, the attorney enjoys the protection of the court under its power to cite for contempt those who file false complaints. Contempt proceedings, however, can be initiated only by the court, not by the attorney, and, as Professor Cowan has observed, it is very doubtful that contempt proceedings against a complainant would be consistent with the theory of absolute privilege.[25] Even if such proceedings were permitted, the penalty of incarceration or fine which the court might exact for the contempt would not be likely to compensate the attorney for the time and money spent in defending himself, much less compensate for the injury done to his reputation. If protection through contempt proceedings is meant to be more than a fanciful fortress for the attorney, the threat thereof might be said to serve as a

[20] 113 N. J. L. 582 at 586, 175 A. 62 at 66.

[21] Saum v. Proudfit, 122 N. J. L. 96, 4 A. (2d) 35 (1939). A real estate broker there brought a suit for malicious prosecution based on a false complaint registered with the real estate commission.

[22] National Surety Co. v. Page, 58 F. (2d) 145 (1932), involved an insurance agent who was permitted to maintain a suit for malicious prosecution on a proceeding to revoke his license.

[23] Melvin v. Pence, 130 F. (2d) 423 (1942), concerned a private detective who sued for malicious prosecution on false charges filed with licensing authorities.

[24] See the opinion of Wachenfeld, J., 18 N. J. 280 at 292, 113 A. (2d) 671 at 678.

[25] See article mentioned in note 12, ante.

more serious deterrent than "the milder and more protective malicious prosecution action."[26]

In any event, it can be said that the possible existence of this latter remedy has not, as the statistics will bear out, proved to be a deterrent to the filing of charges against attorneys.[27] While these same statistics would indicate that the practicing attorney who is charged with personal or professional misconduct can expect fair and impartial treatment at the hands of a grievance or an inquiry committee, it should be noted that these bodies also act as the prosecuting attorney in the event disciplinary action is undertaken. With all due respect to the members of such committees, whose services are generally rendered gratuitously, the stakes from the standpoint of the accused attorney are much too high to be entrusted solely to tribunals burdened with duties comparable to those performed by the prosecuting attorney, the grand jury, and the public defender.[28]

Perhaps the most serious criticism that can be directed against the decision in the instant case is that it denies to attorneys the equal protection of the laws, even if it does not deprive them of their property without due process, in violation of constitutional mandate.[29] Up until this case was decided, members of the bar typically have enjoyed the same types and degrees of protection accorded to the members of other professions.[30] The decision would now relegate the members of an honorable profession to the status of second class citizens who may, at any time,

26 The quotation is taken from p. 8 of the brief of the New Jersey State Bar Association, Intervenor and Amicus Curiae, filed in the United States Supreme Court in connection with the petition for certiorari in the instant case.

27 The New Jersey Law Journal, under date of March 30, 1950, reports that: "75 to 90 of every 100 complaints are of the unsubstantial or crack-pot variety [and the] great majority of the remainder have resulted in acquittals." Phillips and McCoy, Conduct of Judges and Lawyers (Parker and Co., Los Angeles, 1952), have indicated that, in the twenty-one year period from 1928 to 1948, the Illinois State Bar Association received 566 complaints. Of these, 538 were dismissed by the Grievance Committee. Disciplinary action was recommended in only 28 instances. The Illinois Supreme Court ordered disbarment in 17 cases, directed suspension in 9, and dismissed 2. During this same period, the Chicago Bar Association received an estimated 18,000 complaints; referred approximately 8,600 of these to its Committees on Inquiry; and these committees dismissed about 8,200 of the claims.

28 Charles H. Borden, reporting for the Committee of Inquiry of the Chicago Bar Association, Annual Reports 1947-48, p. 13, notes that the "Committee on Inquiry . . . might be called Prosecuting Attorney, the Grand Jury, and the Public Defender all rolled into one."

29 See U. S. Const., Amend. XIV, § 1.

30 A recent example of this fact may be seen in the holding in the case of Employers Liability Assurance Corp. v. Freeman, 229 F. (2d) 547 (1955), wherein it was pointed out that a third person's interference with the contractual relations existing between an attorney and his client could amount to an actionable wrong.

be forced into an arena, like gladiators stripped of mail and sword, to face the assaults of an unlimited number of malicious antagonists, all of whom would be shielded, as well as armed to the hilt, with absolute privilege. The prospect is not an inviting one and the court which formulated it is not entitled to congratulations for having done so.

A. F. POLICK

NEGLIGENCE—ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE—WHETHER A CERTIFIED PUBLIC ACCOUNTANT IS LIABLE FOR LOSSES TO A CLIENT RESULTING FROM ACCOUNTANT'S FAILURE TO VERIFY CORRECTNESS OF ACCOUNTS RECEIVABLE—Plaintiff, in the case of *Cereal Byproducts Company* v. *Hall*,[1] sought to recover damages resulting from the alleged negligence of defendants, a firm of certified public accountants, in auditing the books of plaintiff. Defendants had been employed to make an annual audit of plaintiff's books and to prepare its federal income tax returns. The plaintiff's case was based upon the alleged negligence of the defendants in accepting a list of accounts receivable not to be confirmed from an employee of the plaintiff, without the consent or knowledge of any of the officers of the corporation. A bookkeeper's defalcations were thus permitted to remain undiscovered. As a result, substantial losses were suffered, for which the company sought to recover. On appeal by the plaintiffs from an adverse decision following a trial without a jury, the Appellate Court for the First District of Illinois held that the defendant's conduct was sufficiently negligent so as to make the accounting firm liable for the loss which resulted therefrom, so it reversed and remanded with directions to find the defendants guilty of negligence.

The problem thus posed is apparently one not heretofore reviewed by the Illinois courts. It may be well, therefore, to treat with the decisions in other jurisdictions. In England, the duties of auditors are defined by statute, to a limited extent, in that their report must state (1) whether or not they have obtained all the information and explanations they have required, and (2) whether, in their opinion, the balance sheet to which they have referred in the report has been properly prepared so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given them and as shown by the books of the company.[2] In order to prepare such a report, the auditor must, then, examine the books, not merely for the purpose of satisfying himself as to what they show but also to ascertain that what they show presents the true financial position of the com-

[1] 8 Ill. App. (2d) 331, 132 N. E. (2d) 27 (1956). Appeal dismissed.

[2] See Companies Act of 1929, 19 & 20 Geo. V, c. 23, § 134.

pany.[3] In that connection, Lord Justice Lindley, in the case entitled *In re London and General Bank (No. 2)*,[4] said: "Such I take to be the duty of the auditor: he must be honest—*i.e.*, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required."[5]

Speaking of how the auditor is to ascertain whether the books and records do, in fact, show that position, the court said it was his duty to "check the cash, examine vouchers for payments, see that the bills and securities entered in the books were held by the [client], and take care to ascertain their value."[6] It would also be his duty to consider whether payments made by the company before the audit were *ultra vires*,[7] and he may, at least in England, be considered negligent if he accepts a certificate issued by brokers of the company to the effect that securities are in their possession, however trustworthy they may be, unless the certificate has been given by a bank or other person who, in the ordinary course of business, would be entrusted with securities.[8] Although it

[3] Leeds Estate, Building & Investment Co. v. Shepherd, 36 Ch. D. 787 (1887); Cuff v. London and County Land & Building Co., [1912] 1 Ch. 440.

[4] [1895] 2 Ch. 673.

[5] [1895] 2 Ch. 673 at 683. See also Fox & Son v. Moorish, Grant & Co., 35 T. L. R. 126 (1918), and Mead v. Ball, 106 L. T. 197 (1912).

[6] [1895] 2 Ch. 673 at 684. In the case mentioned, the auditors were cognizant of the worthless character of the accounts receivable, one of the chief assets of the bank, but their report to the stockholders and to the directors was modified, at the insistence of the managing director, so as not to discourage the payment of a dividend. The court held this to be a failure to maintain the standard of honesty owed by the auditors to the shareholders. See also Western Counties Steam Bakeries & Milling Co., [1897] 1 Ch. 617; McBride's, Ltd. v. Rooke & Thomas, [1942] 3 D. L. R. 81 (Sask.), but compare with Dantzler Lumber Co. v. Columbia Casualty Co., 115 Fla. 541, 156 So. 116 (1934); National Surety Corp. v. Lybrand, 256 App. Div. 226, 9 N. Y. S. (2d) 554 (1939), and Beardsley v. Ernst, 47 Ohio App. 241, 191 N. E. 808 (1934).

[7] That idea is expressed in the case of In re Republic of Bolivia Exploration Syndicate, Ltd., [1914] 1 Ch. 139, but there the auditors were held entitled to rely on the special circumstances of the case. See also Thomas v. Devonport Corporation, [1900] 1 Q. B. 16, but note that the client there concerned was a municipal corporation. Compare the holding therein with the case of Board of Commissioners of Allen County v. Baker, 152 Kan. 164, 102 P. (2d) 1006 (1940).

[8] In re City Equitable Fire Insurance Co., [1925] Ch. 407. But see Canadian Woodmen of the World v. Hooper, [1933] 1 D. L. R. 168, where the importance of a physical verification of the securities on hand was emphasized.

would not be the duty of the auditor to take stock when auditing the accounts of a company, he may well be required to call for particular items in the stock sheets.[9] He may, of course, limit the scope of his audit by his contract of employment so long as, by so doing, he does not seek to avoid his statutory duties.[10]

In the United States, legislative control over the practice of accounting is to be found only in connection with licensing statutes that pertain to public accountants or to certified public accountants. Of these, the Illinois statute is typical.[11] The Securities and Exchange Commission has also, to some extent, defined the accountant's duties and has required certain audit procedures.[12] In addition, pursuant to an attempt to provide a guide for its members, the American Institute of Accountants has made pronouncements from time to time with respect to auditing standards. Of particular significance, in that connection, is the extension of auditing procedures, made in 1939, to include the confirmation of receivables whenever this asset represents a significant proportion of the current assets or of the total assets of a business.[13] It might be said, therefore, that the general standard of care as adopted by the courts of England has become the American rule as well.[14]

[9] Squire, Cash Chemist v. Ball, Baker & Co., 106 L. T. 197 (1911). The court stressed the proposition that an auditor should make a reasonable and proper investigation. See also In re Kingston Cotton Mill Company (No. 2), [1896] 2 Ch. D. 279 at 288, where the court did say: "He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care."

[10] International Laboratories, Ltd. v. Dewar, 41 Manitoba L. R. 329 (1933); Fox & Son v. Moorish, Grant & Co., 35 T. L. R. 126 (1918). Compare with O'Neill v. Atlas Automobile Finance Corp., 139 Pa. Super. 346, 11 A. (2d) 782 (1940).

[11] Ill. Rev. Stat. 1955, Vol. 2, Ch. 110½, § 1 et seq. The statute provides generally for the qualifications, examination, registration, etc., of public accountants. Of particular interest is Section 44 thereof, which provides that a license may be revoked for any one, or any combination, of the causes there mentioned, including knowingly certifying to any false or fraudulent report, certificate, schedule, and the like, or for gross carelessness or incompetence.

[12] For a discussion of the influence of the Securities and Exchange Commission in this regard, see comment entitled "Accounting Principles and Auditing Responsibilities Established Under The Securities Acts," 33 Ill. L. Rev. 820-44 (1939). See also 15 U. S. C. A. §§ 77a-78hh. For an example of the Commission's position on auditing procedures, see Sec. & Exch. Com., Accounting Release, No. 91, December 5, 1940.

[13] See American Institute of Accountants, Statements on Auditing Procedures, No. 1, October 1939.

[14] O'Connor v. Ludlum, 92 F. (2d) 50 (1937); Dantzler Lumber & Export Co. v. Columbia Casualty Co., 115 Fla. 541, 156 So. 116 (1934); Board of County Com'rs of Allen County v. Baker, 152 Kan. 164, 102 P. (2d) 1006 (1940); City of East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181 (1913); State Street Trust Co. v. Ernst, 278 N. Y. 104, 15 N. E. (2d) 416 (1938); Ultramares Corporation v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931); National Surety Corp. v. Lybrand, 256 App. Div. 226, 9 N. Y. S. (2d) 554 (1939); Smith v. London Assur. Corp., 109 App. Div. 882, 96 N. Y. S. 820 (1905); O'Neill v. Atlas Automobile Finance Corp., 139 Pa. Super. 346, 11 A. (2d) 782 (1940).

By way of illustrating this point, attention could be called to some of the cases in the field. In the case of *Craig* v. *Anyon*,[15] for example, the auditors relied on the records and reports supplied by a trusted margin clerk, employed by their client, a brokerage firm. By reason of the auditor's failure to circularize and verify certain of the customers' accounts, the employee's manipulations in these accounts, designed to conceal his embezzlement of large sums of money, were permitted to remain undiscovered. The court, in a three-to-one decision, regarded the auditor's conduct as being clearly negligent, but denied relief because of the contributory negligence on the plaintiff's part. In *Maryland Casualty Company* v. *Cook*,[16] an auditor of the city's books and records also failed to circularize the delinquent accounts outstanding and it was held that this, together with other omissions, constituted negligence. The importance of verifying the trial balance with the control and proving its clerical accuracy was stressed in the case of *O'Neill* v. *Atlas Automobile Finance Corporation*[17] and the proper classification of accounts and notes due from subsidiaries, together with the auditor's responsibility for a proper display of collateral securing the receivables, was emphasized in the case of *O'Connor* v. *Ludlam*.[18]

Among the leading cases on the subject is that of *Ultramares Corporation* v. *Touche*,[19] in which case the accountants were held to be negligent for their failure to verify a list of entries to the ledger, purporting to represent accounts receivable, when a mere glance at the supporting documents would have disclosed their falsity. In another leading case, that of *State Street Trust Company* v. *Ernst*,[20] the New York Court of Appeals, in a four-to-one decision, held the auditing firm guilty of a degree of gross negligence which was sufficient to raise an inference of fraud. The court there permitted recovery by a creditor of the client on a showing that the credit had been extended in reliance upon statements prepared by the

[15] 212 App. Div. 55, 208 N. Y. S. 259 (1925). Clark, P. J., wrote a dissenting opinion. Compare the holding therein with the McKesson & Robbins case, Sec. & Exch. Com., Accounting Release No. 19, December 5, 1940, p. 8. See also Blue Band Navigation Company v. Price-Waterhouse & Co., (1934) 3 D. L. R. 404.

[16] 35 F. Supp. 160 (1940). See also City of East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181 (1913), but compare with Fidelity & Deposit Company of Maryland v. A. L. Atherton, 47 N. M. 443, 144 P. (2d) 157 (1944).

[17] 139 Pa. Super. 346, 11 A. (2d) 782 (1940).

[18] 92 F. (2d) 50 (1937). The point is also discussed in State Street Trust Co. v. Ernst, 278 N. Y. 104, 15 N. E. (2d) 416 (1938).

[19] 255 N. Y. 170, 174 N. E. 441 (1931). See also Owens v. Waterhouse, 225 App. Div. 582, 233 N. Y. S. 535 (1929).

[20] 278 N. Y. 104, 15 N. E. (2d) 416 (1938). Compare the holding therein with the results attained in O'Connor v. Ludlum, 92 F. (2d) 50 (1937); Flagg v. Senf, 16 Cal. App. (2d) 545, 60 P. (2d) 1004 (1936); Glanzer v. Shepherd, 233 N. Y. 236, 135 N. E. 275 (1922); Smith v. Hedges, 223 N. Y. 176, 119 N. E. 396 (1918); and Landell v. Lybrand, 264 Pa. 406, 107 A. 783 (1919).

defendants, in which statements the auditors had failed to question the way in which certain bad debt reserves had been computed. A dissenting judge, who regarded the auditors' report as being based upon an honest opinion, although a somewhat over-optimistic one, refused to concur with the majority opinion that fraud was present but did agree with the proposition that the failure to give the information an effect which expert witnesses testified should, in their opinion, be given to it was enough to constitute negligence.

The degree of consistency to be found in both the English and the American cases treating with the problem posed by the instant case is significant when viewed in the light of the increasingly heightened position which the public accountant occupies in the structure of modern commercial society. If the rule of reason, as heretofore applied, were not so closely adhered to as a measure of the accountant's duty of care, auditing procedures might well be changed to conform to a single method or approach. If that approach must, of necessity, include detailed procedures not always warranted by the circumstance, the expense of such an audit could be burdensome, if not actually ruinous, to many business men. Nevertheless, if the accountant does not effectively qualify his responsibility at the outset, he must observe the standards of care laid down by law for those who engage in that type of activity or else must suffer the consequences. Taken in this light, the decision in the instant case is one well-grounded in sound law.

S. D. WEISS

PARENT AND CHILD—ACTIONS BETWEEN PARENT AND CHILD—WHETHER MINOR MAY MAINTAIN ACTION AGAINST PARENT FOR INJURIES CAUSED BY WILFUL AND WANTON MISCONDUCT OF PARENT—By reason of having granted leave to appeal in the case of *Nudd* v. *Matsoukas*,[1] the Illinois Supreme Court recently came to possess a firm grip on the problem as to whether or not a child should be permitted to maintain an action in tort against the parent to recover damages flowing from the culpable fault of the parent. The complaint therein had alleged that the father had wilfully, recklessly and wantonly[2] driven his vehicle through a stop light at

[1] 7 Ill. (2d) 608, 131 N. E. (2d) 525 (1956), reversing 6 Ill. App. (2d) 504, 128 N. E. (2d) 609 (1955). See also the case of Emery v. Emery, 45 Cal. (2d) 421, 289 P. (2d) 218 (1955), wherein the California Supreme Court, while recognizing that the basic policy behind the rule of parental immunity was the preservation of the parent's right to discipline his minor child, nevertheless held that an unemancipated minor could sue his parent for a wilful or malicious tort inflicted by the parent on the child.

[2] This charge was made necessary because Ill. Rev. Stat. 1955, Vol. 2, Ch. 95½, § 58a, denies recovery by a guest passenger against the host-driver in simple negli-

an excessive rate of speed on a foggy night thereby causing the same to collide with an automobile driven by the other defendant and, as a consequence, producing the death of his wife, mother of the principal plaintiff, and that of one minor child while also seriously injuring the plaintiff, another minor child, all of whom were passengers in the automobile. Under one count of the complaint, the husband-father was charged with causing a wrongful death to the detriment of the surviving minor child.[3] By a separate count, the surviving child, through his next friend, sought to hold his father and the other driver liable for the personal injury so sustained. A trial court order dismissing these counts as to the parent was affirmed by the Appellate Court for the First District on the theory that the father-defendant was entitled to a parental immunity from liability. The Supreme Court, however, reversed this holding when it reached the conclusion that, whatever the rule might be as to parental responsibility for negligent harm inflicted on a child, the immunity did not extend to save the wilful, wanton or reckless parent from liability.

The concept of immunity of the parent from suits in tort by unemancipated minor children has been the basis of a great amount of litigation in American courts for the last sixty years, and the most cursory examination of the subject reveals that the majority of jurisdictions in the past have denied liability of the parent for a variety of reasons,[4] few of which can withstand a severe critical analysis. From the modern historical point of view, probably the initial adjudication of the problem arose in the

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gence cases. As to whether a minor child may be said to be a "guest" when riding with the parent of another, a point not resolved by the opinion in the instant case, see Fuller v. Thrun, 109 Ind. App. 407, 31 N. E. (2d) 670 (1941). There is an indirect treatment of the subject in Johnson v. Chicago & North Western Railway Co., 9 Ill. App. (2d) 340, 132 N. E. (2d) 678 (1956), where an administrator of a deceased minor grandchild's estate was permitted a recovery against the estate of the deceased grandparent who had recklessly driven an automobile onto a railroad track despite the warning given by a flashing signal.

[3] The count for wrongful death was stricken on the basis that the wrongdoing parent, who was one of the heirs at law of the persons killed in the collision, ought not be permitted to share in the recovery and, as he was barred, all other beneficiaries were necessarily barred as well. Reliance, for this purpose was placed on the holding in Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N. E. 392, 30 A. L. R. 491 (1923). The Supreme Court, taking note of the fact that the Wrongful Death Act had been specifically amended in 1955 to obviate the hardships posed by the earlier holdings (Laws 1955, pp. 293 and 2006; Ill. Rev. Stat. 1955, Vol. 1, Ch. 70, § 2), which amendment became effective after the incidents involved in the case at hand, expressly overruled the decision in the Hazel case, saying it rested on a distinction that was "fictitious rather than real." It may now be said to be the law, both as reflected in legislation and in judicial decision, that the negligence of a defendant-beneficiary will not serve to defeat a recovery for wrongful death by other non-negligent beneficiaries.

[4] McCurdy, "Torts Between Persons in Domestic Relation," 43 Harv. L. Rev. 1030-82 (1930), at p. 1072.

Mississippi case of *Hewellette* v. *George*[5] wherein the court denied to a minor daughter both punitive and compensatory damages in a suit against her mother for false imprisonment. At the time it refused recovery on the ground of public policy, the Mississippi Supreme Court there stated that the "peace of society" forbade that a minor child should have the "right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent."[6] Fourteen years later, the Supreme Court of Washington, in a ridiculous and unrealistic application of the doctrine of domestic tranquility, went so far as to deny relief to a minor daughter who had been raped by her father.[7] It is true that the court there stated that the common law served to prohibit suits of this type but it would appear that there never was a clear common law doctrine prohibiting minors from suing their parents in tort.[8]

The doctrine expounded in the Hewellette case, however, was pretty generally followed in the United States up until the time of the case of *Dunlap* v. *Dunlap*.[9] The Supreme Court of New Hampshire there held that the aforementioned public policy would have no application where the unemancipated minor, seeking damages for injuries sustained while employed by the father, could show that the father was insured and

[5] 68 Miss. 703, 9 So. 885 (1891). The views there expressed still seem to prevail in Mississippi for, in Durham v. Durham, — Miss. —, 85 So. (2d) 807 (1956), the court held that an unemancipated minor could not maintain a wrongful death action against her father whose negligence, in causing an automobile accident, was the prime factor in producing the death of the minor's mother. See also Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924), and McKelvey v. McKelvey, 111 Tenn. 338, 77 S. W. 664 (1903). But see Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

[6] 68 Miss. 703 at 711, 9 So. 885 at 887.

[7] Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). The court stated that the criminal law served to protect the child from this type of injury.

[8] Eversley, The Law of The Domestic Relation (Stevens & Haynes, London, 1906), 3d Ed., p. 578, says: "The right of a child to bring an action against his parents in respect to the latter's dealings with his property is unquestioned." The author then goes on to say that while it is not clear whether a minor child can sue his parent for tort, there is no common law rule to prevent such action from being brought. See also Reeve, The Law of Husband and Wife, Parent and Child, Guardian and Ward, Master and Servant (Wm. Gould, Jr. & Co., Albany, N. Y., 1888), 4th Ed., p. 357, wherein it is stated that at common law an action could be brought against a parent by a child, even for a tort, with the author saying: "The maxim is that he has the power to chastise him moderately. The exercise of this power must be in a great measure discretionary. He may so chastise his child as to be liable in an action against him for a battery. The child has rights which the law will protect against the brutality of a barbarous parent."

[9] 84 N. H. 352, 150 A. 905, 71 A. L. R. 1055 (1930). For cases prior thereto holding that insurance should not be a factor see Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Elias v. Collins, 237 Mich. 175, 211 N. W. 88 (1926); Damiano v. Damiano, 6 N. J. Misc. 849, 143 A. 3 (1928); Small v. Morrison, 185 N. C. 577, 188 S. E. 12 (1923). Even after 1930, some courts have applied the parental immunity doctrine where the parent was insured: Rambo v. Rambo, 195 Ark. 832, 114 S. W. (2d) 468 (1938); Luster v. Luster, 299 Mass. 480, 13 N. E. (2d) 438 (1938); and Villaret v. Villaret, 169 F. (2d) 677 (1948).

thereby place the burden of paying damages on the insurer. It might also be mentioned that there has been conflict on the point as to whether the parental immunity should be extended to persons who stand in the relation of *in loco parentis*.[10] The specific nature of the particular relationship, in this instance, probably should be a determining factor for a person who has permanent control over a minor child would need to exercise a greater amount of judgment and discretion than one who has no more than a temporary custody.

It is quite likely that the domestic tranquility argument derived some support from an analogy to the common law relationship of husband and wife wherein, prior to legislation in the field, the common law rule seemed to be that neither spouse could sue the other in tort.[11] That analogy has tended to fail in recent years for most states have enacted legislation, generally classified as Married Women's Acts, which partially, if not completely, destroy the legal immunities which may have existed between husband and wife because of the marital relationship.[12] Moreover, since the common law allowed an infant a right of action against a parent in debt, or to recover real estate, or to require the parent, as trustee, to account for trust funds held by the parent for the infant, it does seem anomalous to deny to the infant a right of action for harm done to the person. As a consequence, at least two jurisdictions have permitted unemancipated minors to sue where, at the time of the injury, the relationship was more nearly that of carrier and passenger,[13] and still others sanction a recovery where the injuries were sustained because of the negligence of the parent while he was acting in the scope of his employment.[14]

Nevertheless, it must be said that a large body of authority still sustains the application of the parental immunity doctrine where the act of

[10] Immunity of the type mentioned has been extended in Foley v. Foley, 61 Ill. App. 577 (1895); Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (1906); and Cook v. Cook, 232 Mo. App. 994, 124 S. W. (2d) 675 (1939). Contra: Brown v. Cole, 198 Ark. 417, 129 S. W. (2d) 245 (1939); Chastain v. Chastain, 50 Ga. App. 241, 117 S. E. 828 (1935); Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901); Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903); Steber v. Norris, 188 Wis. 366, 206 N. W. 173 (1925).

[11] 27 Am. Jur., Husband and Wife, § 589, p. 191; 41 C. J. S., Husband and Wife, § 396, p. 877.

[12] See note in 30 CHICAGO-KENT LAW REVIEW 343-9. Insofar as torts to the person are concerned, however, the majority of the courts still apply the common law rule: Sink v. Sink, 172 Kan. 217, 239 P. (2d) 933 (1952). See also Ill. Rev. Stat. 1955, Vol. 1, Ch. 68, § 1.

[13] Worrell v. Worrell, 174 Va. 11, 4 S. E. (2d) 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

[14] Radlecki v. Travis, 39 N. J. Super. 263, 120 A. (2d) 774 (1956); Foy v. Foy Electric Co., 231 N. C. 161, 56 S. E. (2d) 418 (1949); Signs v. Signs, 156 Ohio St. 566, 103 N. E. (2d) 743 (1952); Borst v. Borst, 41 Wash. 642, 251 P. (2d) 149 (1952).

the parent amounts to nothing more than simple negligence.[15] In this area, perhaps, lurks the basis for the most conflict since the nature of the relationship between parent and child rests on a much more subtle ground than is true of the ordinary legal relationships between strangers. In order to adequately conduct a child from infancy to majority, the parent, of necessity, must exercise a great amount of control and discretion in supervising the behavior of the child. To allow an injured child to conduct a tort action against the parent where the injury occurred as a result of an exercise of poor parental judgment in this connection would certainly be opening the door to a tremendous amount of domestically disruptive litigation. Even so, with the current widespread use of the automobile, the presence of liability insurance has, to some extent, eliminated the domestic harmony predicate for the parental authority doctrine. It would seem appropriate, therefore, if an insurance company is involved, to permit recovery by an injured child, even one harmed as the result of a mere negligent parental act, unless it could be clearly shown that fraud and collusion were present. If a stranger to a parent who has protected himself with insurance is to be permitted to reap the benefit of such insurance, what valid reason is there why an unemancipated family member should go unaided?

In sharp contrast to the views expressed in the early cases, however, is the modern trend which permits an unemancipated minor to conduct a tort action against the parent, or the person standing *in loco parentis*, where the injury has resulted from wilful or wanton misconduct.[16] This would appear to be a more rational approach, for it is extremely difficult to see how any domestic tranquillity worth preserving can remain after a

[15] Augustin v. Ortiz, 187 F. (2d) 496 (1951); Villaret v. Villaret, 169 F. (2d) 677 (1948); Scruggs v. Meredith, 135 F. Supp. 376 (1955); Rambo v. Rambo, 195 Ark. 832, 114 S. W. (2d) 468 (1938); Yost v. Yost, 172 Md. 128, 190 A. 753 (1937); Luster v. Luster, 299 Mass. 480, 13 N. E. (2d) 438 (1938); Strong v. Strong, 70 Nev. 296, 269 P. (2d) 265 (1954); Reingold v. Reingold, 115 N. J. L. 532, 181 A. 153 (1935); Cannon v. Cannon, 287 N. Y. 425, 40 N. E. (2d) 236 (1942); Rutkowski v. Wasko, 286 App. Div. 327, 143 N. Y. S. (2d) 1 (1955); Epstein v. Epstein, 283 App. Div. 855, 129 N. Y. S. (2d) 54 (1954); Reynolds v. Marmorosch, 208 Misc. 626, 144 N. Y. S. (2d) 900 (1955); Schomber v. Tait, 207 Misc. 328, 140 N. Y. S. (2d) 746 (1955); Murphy v. Murphy, 206 Misc. 228, 133 N. Y. S. (2d) 796 (1954); Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N. C. 55, 89 S. E. (2d) 788 (1955); Redding v. Redding, 235 N. C. 638, 70 S. E. (2d) 676 (1952); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Matarese v. Matarese, 47 R. I. 131, 131 A. 198 (1926); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S. W. (2d) 37 (1952); Securo v. Securo, 110 W. Va. 1, 156 S. E. 750 (1931); Ball v. Ball, 59 Wyo. 204, 269 P. (2d) 302 (1954).

[16] Wright v. Wright, 85 Ga. App. 721, 70 S. E. (2d) 152 (1952); Cannon v. Cannon, 287 N. Y. 425, 40 N. E. (2d) 236 (1942); Siembab v. Siembab, 202 Misc. 1053, 112 N. Y. S. (2d) 82 (1952); Meyer v. Ritterbush, 196 Misc. 551, 92 N. Y. S. (2d) 595 (1949); Aboussie v. Aboussie, 270 S. W. (2d) 636 (Tex. Civ. App., 1954); Borst v. Borst, 41 Wash. (2d) 642, 251 P. (2d) 149 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

father has raped his daughter,[17] has cruelly and inhumanly beaten his children,[18] has deprived them of adequate food and clothing,[19] or has forced them to ride in an automobile driven by an intoxicated parent.[20] Perhaps the most ridiculous attempt to defend with the doctrine of parental immunity was the one made in the Maryland case of *Mahnke* v. *Moore*.[21] According to the facts of that case, the father had murdered the mother in the presence of the child, kept the child with the corpse for a week, and then committed suicide in front of her. Suing her dead father's estate by her next friend, the child asked damages for shock, mental anguish, and permanent physical injuries. Denying the claim of parental immunity which had been presented as a defense, the court held that the acts of the father showed so complete an abandonment of the parental relation and of his parental authority and privileges as to warrant a decision that his immunity from suit had been forfeited.

After twenty-three years of silence in the Illinois law on the subject,[22] the instant case now exhibits a purpose on the part of the Illinois Supreme Court to follow the modern and more enlightened viewpoint. What action the court may take in a simple negligence case between parent and child cannot be prophesied but the signs are now clear that the doctrine of parental immunity is to be regarded as a privilege which will not be remorselessly applied where the injury to the child is intentional in character or arises from wanton misconduct.

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17 Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

18 McKelvey v. McKelvey, 111 Tenn. 338, 77 S. W. 664 (1903).

19 Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903).

20 Cowgill v. Boock, 189 Ore. 282, 218 P. (2d) 445 (1950).

21 197 Md. 61, 77 A. (2d) 923 (1951).

22 Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933). Reference to the case of Welch v. Davis, 410 Ill. 130, 101 N. E. (2d) 547 (1951), is omitted since the child there concerned was a minor step-daughter who sought to recover from the deceased step-parent's estate for the wrongful death of the minor's mother.